No. 2766

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK MENEFEE, B. F. BONNEWELL, H. M. TODD, AND OSCAR A. CAMPBELL,
*Plaintiffs in Error.*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

# BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Clarence L. Reames, United States Attorney for Oregon, and John J. Beckman, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Defendant in Error.

Martin L. Pipes, J. J. Fitzgerald, John F. Logan, Attorneys for Plaintiffs in Error.



SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

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# CASES CITED IN THIS BRIEF

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U. S. vs. New South Farm & Home Co., Supreme Court, April 24, 1916.

## STATEMENT OF CASE.

The defendants Menefee, Todd, Campbell and Bonnewell were indicted, tried and convicted in the United States District Court of Oregon for a violation of section 37 of the Federal Penal Code alleged to have been committed by the defendants conspiring to violate section 215 of said Code.

While there are nineteen assignments of error, these assignments cover but three propositions of law, and there are in reality but three assignments of error in the entire record. Assignments numbered I, II and III are based upon a ruling of the court permitting the introduction of evidence given by the witness Oviatt in relation to a machine known as the payograph. Assignments of error numbered IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI are all based upon a ruling of the court permitting the introduction of the testimony given by the witness Sewall relative to certain alleged infringements of certain patents and applications for patents of the United States Cashier Company; assignments of error numbered XVII, XVIII, and XIX are based upon certain instructions given by the

court to the jury relative to the presumption of the intent to defraud growing out of wilful, deliberate, and false statements of facts made by the defendants to induce the payment of money.

The trial began before a court and jury on July 6, 1915, and terminated by a verdict of "Guilty" on the 21st day of August, 1915 (Transcript of Record, pages 98 to 103); during the course of the trial the Government introduced 442 exhibits, consisting in the main of letters and telegrams (Transcript of Record, page 161), and called sixty-four (64) witnesses (Transcript of Record, page 170).

No contention is made by the defendants that the evidence introduced by the Government was not sufficient to sustain and justify the verdict of the jury.

In order to eliminate the enormous expense incident to the printing of the various exhibits, the parties have stipulated (Transcript of Record, page 275) that the following exhibits shall be transmitted in the original as a part of the transcript:

Government Exhibits 1 to 16 inclusive;
Government Exhibit 22;
Government Exhibits 28 to 30 inclusive;
Government Exhibits 34 and 35;
Government Exhibits 45 and 46;
Government Exhibit 53;

Government Exhibits 55 to 57 inclusive;
Government Exhibits 59 to 70 inclusive;
Government Exhibits 74 to 85 inclusive;
Government Exhibits 92 to 108 inclusive;
Government Exhibits 110 to 220 inclusive;
Government Exhibits 222 to 442 inclusive.

In the preparation of the Bill of Exceptions, in order to avoid the necessity of repeating the names of certain of the defendants, the statement is made (Transcript of Record, page 111) that wherever in the statement of the evidence the term "THE DEFENDANTS" is used that it means and includes the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell. In this brief for the purpose of brevity we will use the same term in speaking of these parties in order to save repetition of their names in so many instances.

It is shown by the Bill of Exceptions that at the trial the Government offered evidence which was received, and which tended to prove each, every and all of the following facts:

I.

That at and during all of the times between September 1, 1910, and January 31, 1914, the United States Cashier Company was a corporation organized and ex-

isting under the laws of the state of Oregon, with its principal office and place of business at Portland, Oregon (Transcript of Record, page 108).

## II.

That at and during all of the following named respective times and dates the defendants were respectively the following duly elected, qualified and acting officers of said corporation, to-wit:

Frank Menefee, the President and Director from September 1, 1910, to January 31, 1914; and the General Manager from September 28, 1910, to January 31, 1914;

F. M. LeMonn, the Sales Manager from September 1, 1910, to November 1, 1912;

O. E. Gernert, an Agent, Salesman, and Assistant Sales Manager from January 1, 1911, to April 1, 1912;

B. F. Bonnewell, a Fiscal Agent and Salesman from April 15, 1911, to January 31, 1914;

H. M. Todd, a Sales Agent from April 15, 1911, to September 1, 1913;

Joseph Hunter, a Salesman from May 26, 1911, to January 31, 1914.

O. L. Hopson, a Sales Agent from November 23, 1910, to July 1, 1913;

P. E. Muraine, a Salesman from March 6, 1911, to January 31, 1914;

Oscar A. Campbell, a Director from June 12, 1911, to January 31, 1914; the Vice-President from January 30, 1912, to January 31, 1914; and a Salesman from January 1, 1911, to July 1, 1913;

Thomas Bilyeu, a Director from June 9, 1913, to January 31, 1914. (Transcript of Record, pages 108, 109 and 110.)

III.

That the capital stock of the corporation at and between all of the dates mentioned in the indictment amounted to the sum of one million two hundred thousand dollars ($1,200,000.00), segregated into one hundred twenty thousand (120,000) shares of the par value of ten dollars ($10.00) each. (Transcript of Record, page 110.)

IV.

That at the city of Portland, within Multnomah County, Oregon, and on or about September 1, 1910, THE DEFENDANTS did then and there unlawfully, wilfully and feloniously conspire, confederate and agree together to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud, to-wit, section

two hundred and fifteen of the criminal code of the United States; that is to say, THE DEFENDANTS did then and there unlawfully, wilfully and feloniously conspire, combine, confederate and agree together and with divers other persons, to devise and execute a scheme and artifice to defraud to be effected by means of the post office establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises from the fifty-five persons named in the indictment, and therein termed INVESTORS, and from divers other persons, and the public generally, by inducing, inciting and procuring the said INVESTORS and divers other persons and the public generally, to open communication with THE DEFENDANTS and with the said United States Cashier Company, a corporation, and by inducing, inciting and procuring the said INVESTORS and divers other persons, and the public generally, to purchase from THE DEFENDANTS and from said corporation, the shares of stock of said corporation and to pay over, deliver and to transfer to THE DEFENDANTS and to the said corporation, in exchange and payment for said shares of stock the money and property of the said INVESTORS and of divers other persons, the payment of said sums of money to THE DEFENDANTS and to the said corporation, and the transfer of said property to THE DEFENDANTS and to the said corporation to be induced, incited

and procured by the false and fraudulent representations of THE DEFENDANTS to be made to the said INVESTORS and to divers other persons by THE DEFENDANTS. (Transcript of Record, pages 111 and 112.)

V.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by THE DEFENDANTS that said scheme and artifice to defraud the said INVESTORS and divers other persons, and the public generally, should be by THE DEFENDANTS carried out, carried on and effected by the further means, methods, manner and plans, that is to say, THE DEFENDANTS would cause, induce, incite and procure the said INVESTORS and many and divers other persons, and the public generally, to pay over and deliver to and to transfer to THE DEFENDANTS, and to the said corporation in payment of and in exchange for the shares of stock of said corporation, money and property of the value of more than the sum of one million dollars, which said payment of said money and which transfer of said property was to be by THE DEFENDANTS induced, incited, procured and obtained by the dishonest, fraudulent and false representations and promises hereinafter set forth, all to be made to the said INVESTORS by THE DEFENDANTS and to divers other persons and the pub-

lic generally, and to swindle, cheat and defraud said INVESTORS and each, every and all thereof, and various and sundry other persons, and the public generally, out of all of the said sums of money and the said property that the said INVESTORS and various other persons, and the public generally, should pay over and deliver to THE DEFENDANTS or either thereof, or to the said corporation. (Transcript of Record, pages 112 and 113.)

VI.

That for the purpose of inducing and procuring the said INVESTORS and divers other persons and the public generally to purchase said shares of stock of said corporation, and to pay and deliver to THE DEFENDANTS and said corporation money and property in payment therefor, THE DEFENDANTS would falsely and fraudulently and by means of advertisements and letters to be by THE DEFENDANTS transmitted through the mail, represent, pretend and promise that the said corporation owned the patents to a certain change computing machine, a certain bank cashier machine, a certain lightning-change-maker, a certain currency paying machine, and a certain new style adding machine; that the said corporation was engaged in the business of manufacturing and selling all of said machines; that the said shares of stock were of great commercial value, and that large dividends and profits would

surely be paid thereon within six months from the date of purchase; that the corporation was the owner of large bona fide orders for the purchase of said machines, out of which it would make large and certain profit; that the financial condition of the corporation was excellent, and its assets far exceeded its liabilities; that all of the money derived from the sale of stock would be paid into the treasury of the company for the purpoes of increasing its assets, making its shares of stock more valuable, and for the purpose of purchasing and building factories in which to increase the manufacture of said machines; that on account of the splendid financial condition of the corporation THE DEFENDANTS were justified in raising and increasing the selling price of the shares of stock from the par value of ten dollars ($10.00) each to the selling price of fifty dollars ($50.00) each. (Transcript of Record, pages 113 to 116.)

## VII.

That in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all of the times and dates mentioned in the indictment then and there well knew:

(a) Neither the said corporation nor any of THE DEFENDANTS owned the patents to said certain change computing machine, or said certain lightning-change-maker, or said currency paying machine, or said

certain new style adding machine, or either thereof; and

(b) The said corporation was not engaged in either the business of manufacturing or selling said machines or any thereof, but, on the contrary, its business was to sell and dispose of said shares of stock; and

(c) The said shares of stock and each, every and all thereof were of very little value and practically worthless; and

(d) No dividends whatsoever would ever be paid by said corporation to any person who should purchase the said shares of stock; and

(e) None of the INVESTORS or any other person would ever receive from said corporation any dividend whatsoever; and

(f) The said corporation was neither the owner nor in the possession of the said alleged bona fide orders for the purchase of said machines; and

(g) The financial condition of said corporation was not excellent, but the said corporation was absolutely insolvent; and

(h) The value of the assets of said corporation amounted to a sum much less than the total amount of its liabilities; and

(i) A large part of the stock which would be sold under the representations that it was treasury stock, the

proceeds of which were to go into the treasury, was the privately owned stock of THE DEFENDANTS, and all sums of money received thereon would be converted by THE DEFENDANTS to their own use and benefit; and

(j) THE DEFENDANTS were never justified in either raising or increasing the selling price of said shares of stock; and

(k) Each and every person who would purchase said shares of stock would sustain a loss on account of said transaction of all sums of money which he would pay to the said DEFENDANTS in payment therefor. (Transcript of Record, pages 116 to 119.)

VIII.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy that said scheme and artifice to defraud was to be by the said DEFENDANTS carried out by the further plan; that for the purpose of inducing, inciting and procuring the said INVESTORS and the public generally to purchase said shares of stock THE DEFENDANTS would, during the existence of the said conspiracy, fraudulently publish false and untrue written and printed statements of the assets and liabilities of said corporation, in which the assets of said corporation would be stated to be sums greatly in excess of the value of all of said assets, and

in which there would be omitted therefrom liabilities owed by said corporation, amounting to more than the sum of one-half million dollars ($500,000.00); (Transcript of Record, pages 119 and 120;) that large sums of money received from the INVESTORS by THE DEFENDANTS would be appropriated by the said DEFENDANTS to their own use and gain; that the selling price of the stock was to be by THE DEFENDANTS increased at various times from a par value of ten dollars ($10.00) per share to a selling price of fifty dollars ($50.00) per share; that the postoffice establishment of the United States was to be by the said DEFENDANTS used in carrying out said scheme and artifice to defraud. (Transcript of Record, pages 121 and 122.)

IX.

That the conspiracy was to be and was a continuing conspiracy and that it was to and did continue at all times between September 1, 1910, and January 1, 1915. (Transcript of Record, page 122.)

X.

That the defendants Bonnewell, Menefee and LeMonn committed each, every and all of the overt acts mentioned in the indictment in the manner and at the several times and places respectively alleged therein. (Tr. p. 123.)

## XI.

That the Portland Morning Oregonian, the Oregon Journal and the Evening Telegram, at and during all the times mentioned in the indictment, were newspapers published and issued daily and regularly at Portland, Oregon; during all of said times said newspapers and each thereof daily transmitted more than twenty-five thousand (25,000) copies of each publication through the agency of the postoffice department of Portland, Oregon, to subscribers located in all parts of the United States; (Tr. p. 123); that the defendants Menefee and LeMonn inserted in said newspapers and each, every and all thereof certain advertisements set out and described in the transcript at pages numbered 124 to 136.

In these advertisements, all of which were full page displays, (Tr. p. 136), it was specifically stated:

(a) That the value of the patent rights for the Bilyeu cashier for the United States alone is almost priceless;

(b) That the stock would positively advance in price;

(c) That the company would pay one hundred per cent dividend annually;

(d) That millions of dollars in profit would be made;

(e) That immediate investment in the stock should be made;

(f) That one machine alone was sufficient to return original investors tremendous profits;

(g) That the company owned the patents to the Change Computing Machine, the Bank Cashier machine, the Lightening Change Maker, the Currency Paying machine, and the New Style Adding machine;

(h) That the methods of handling money would be revolutionized;

(i) That there never was a machine placed on the market for which there was such a great and actual need;

(j) That the record of the company was unparalleled and the company was fully financed;

(k) That the company was the manufacturer of said machines and all thereof;

(l) That the machine was the product of the United States Cashier Company;

(m) That the machines of the company would outrival the cash register and typewriter in usefulness;

(n) That the machines of the company were new and novel. (Tr., pp. 124-136).

XII.

That at the time these advertisements and each, every

and all thereof were inserted and published in said newspapers, the United States Cashier Company did not own said patents to said machines and the applications for said patents had not been filed (Tr. p. 188).

## XIII.

That the American Cash Record Company was a corporation organized and existing under the laws of the state of Washington, and that during all of the times mentioned, specified and stated in the indictment, the defendant, Thomas Bilyeu, was the president and a director thereof, and was the owner of one-fourth of its capital stock; that the United States Cashier Company, on September 28, 1910, purchased from the American Cash Record Company applications for patent No. 555,552; No. 519,489 and No. 522,240, for a purchase price of $200,000 in cash and $60,000 of the stock of the United States Cashier Company; that from time to time thereafter and up to and including the year 1913, the United States Cashier Company made many cash payments to the American Cash Record Company and to the defendant, Thomas Bilyeu, and that the defendant Bilyeu, during these years, received in cash from the United States Cashier Company, on account of said contract, more than the sum of $50,000; that in November, 1911, the United States Cashier Company purchased from the defendant Thomas Bilyeu patent rights covering the same applications for the republic of Mex-

ico for the sum of $15,000, but that the United States Cashier Company never did anything with any of these rights; that in June, 1912, the United States Cashier Company purchased from the defendant Bilyeu and one Overlin the rights to a currency machine that had been built by Overlin. The consideration of this purchase was that the company was to sell for Bilyeu and Overlin 1600 shares of stock owned by them and to pay them for the stock at the rate of $12.50 per share.

Bilyeu saw the advertisements in the Oregonian, Journal and Telegram referred to in this brief; that upon one occasion the defendant Bilyeu had assisted in the sale of the stock of the United States Cashier Company and had represented to the purchaser that the company owned the patents to all the machines which it was advertising and selling. That during all of the times mentioned in the indictment the defendant Bilyeu was a duly licensed and regularly admitted patent attorney. (Tr. p. 161-163).

## XIV.

That the defendants Menefee and LeMonn, for the purpose of inducing prospective purchasers to purchase the stock of the United States Cashier Company, had written letters to said prospective purchasers in which the statement was made that the patent office at Washington, D. C., could not give the company a single citation wherein the patents of the United States Cashier

Company were infringing on any other patents previously granted and that the United States Cashier Company had made extensive research by the ablest patent attorneys in Washington, D. C., and that said patent attorneys had assured the company that they had full protection for all time to come. (Tr. pp. 163, 164). That prior to the time that said last mentioned letters were written and that during all of the times thereafter, John F. Robb, of Washington, D. C., was the patent attorney for the said United States Cashier Company; that prior to the time that Menefee and LeMonn had written the said letters stating that the patents of the United States Cashier Company did not infringe any prior issued patent, and that the patent office at Washington, D. C., could not give the United States Cashier Company, a single citation wherein the patents of the said company would infringe on any other patents previously granted, and that the patent attorneys for the United States Cashier Company had assured it that it had full protection for all time to come, the defendants Menefee and LeMonn had received from the said patent attorney, John F. Robb, written notice that certain prior issued patents, one issued to a man by the name of Lindeloff and two others issued to the National Cash Register Company, would be infringed by the applications for patents of the said United States Cashier Company, and that the application of the United States Cashier Company for the patent to the Bilyeu cashier and the appli-

cation of said company for the patent to its computing machine would infringe said prior issued patents. (Tr. p. 165.)

## XV.

That during the times mentioned in the indictment the company received in cash from the investors and many and divers other persons, on account of the sale of its capital stock, in cash the sum of $760,165; that it had disbursed over $400,000 to its agents as commissions upon the sale of said stock; that LeMonn and Menefee each separately received a commission of ten per cent of all amounts received by the said company for the sale of said stock; that these amounts were paid to these defendants by virtue of contracts made by said defendants with the directors of said company about the time said defendants entered the employ of the company; that to the agent making the sale of said stock there was by said corporation paid an additional commission of thirty per cent on account of said sales; that approximately $1,500,000 in cash and property were received by said company during said times on account of said sales of said stock; that no dividend was ever declared or paid to any stockholder and the company was never in a position to pay any dividend; that all of the defendants received large sums of money from the company over and above all of the amounts they paid into said company, and each of said defendants made large profits during

all of said times in selling and disposing of their own personal stock of said corporation (Tr. p. 168, 169).

## XVI.

That the defendant LeMonn made a visit east in the early part of the year 1912 and learned of the manufacture of a machine known as the Payograph which was a rival machine to the one being advertised by the United States Cashier Company; that LeMonn sent letters and telegrams to the defendant Menefee with reference to the matter, which letters and telegrams described said machine, stated that he, LeMonn, believed it to be a winner and advised Menefee to not sell any more of the capital stock of the company until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of; that subsequent to the receipt of the said telegram the defendants Menefee and Campbell, at Portland, Oregon, caused the board of directors of the United States Cashier Company to pass a resolution withdrawing all of the company's stock from the market and authorizing the defendants Menefee, LeMonn and Campbell to sell their own personal stock with the sales organization or sales force of the company (Tr. pp. 176, 177).

## XVII.

In a letter written by Menefee (see Gov't Ex. No. 367) he had made the positive statement in the year 1913

that he had had knowledge of the Payograph machine for three years.

At the conclusion of all the testimony offered by both the plaintiff and the DEFENDANTS the court directed a verdict in favor of the defendant Bilyeu.

In addition to the foregoing seventeen propositions of fact, all of which were proven at the trial, the government introduced the exhibits as hereinbefore stated which will be dealt with and considered later in this brief.

Assignments of error numbered I to III, inclusive, are all based upon a ruling of the court permitting the witness Oviatt, who was the president of the Payograph Company to testify that he had, in the year 1909, shown to the defendant Bilyeu the principles of a coin paying machine from which later the Payograph machine was built and constructed; that the defendants Menefee and Bilyeu, being unable to dispose of one of the machines of the United States Cashier Company in England on account of a patent having been issued in that country for the Payograph machine, had approached him for the purpose of purchasing the Payograph right, this testimony being received by the court upon the theory that it went to the question of the good faith of the defendants.

Assignments of error numbered IV to XVI, inclusive, are based upon a ruling of the court permitting the witness Sewall, an expert patent attorney from the De-

partment of the Interior, to testify that in his opinion certain previously issued patents, of which the United States Cashier Company had notice would be infringed by certain of the machines of the United States Cashier Company. In regard to the matter of infringement the court instructed the jury as follows:

> "It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned patents to the certain coin machines heretofore mentioned; when in truth and in fact they did not own such patents. If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any wilful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representa-

tions, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the

representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent purpose, even if material, are not fraudulent. As I understand the testimony it is admitted that, at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case." (Tr. pp. 247, 248, 249).

And the court also instructed the jury as follows:

"The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants

were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions." (Tr. p. 250, 251).

And the court also instructed the jury as follows:

"Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief, as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the

charge that the company was not intending to engage in either the business of manufacturing or selling such machines." (Tr. p. 249, 250).

And the court also instructed the jury as follows:

"The defendants, therefore, are not to be found guilty merely for selling or offering for sale stock in the corporation, although it may have proven an unprofitable investment to the purchaser, nor for mere mistakes or errors in judgment. And there is no presumption of fraud from the fact that glittering and glowing promises may have been made and not carried out, unless it shall appear that the persons who made such promises knew at the time of making same that they could and would not be carried out." (Tr. p. 259).

Assignments of error numbered XVII, XVIII and XIX are based upon the action of the court in giving the following instructions to the jury:

"It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would

necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money." (Tr. p. 308).

"In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they

would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent." (Tr. p. 309).

"The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception." (Tr. p. 309, 310).

In addition to these instructions relative to the presumption of an intent to defraud growing out of false and fraudulent representations made for the purpose of inducing sales of capital stock the court has also instructed the jury as follows:

"To defraud implies or includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something which he already has." (Tr. p. 241).

And also as follows:

"It is necessary, therefore, that it should appear to your satisfaction from the testimony and beyond a reasonable doubt, that the conspiracy entered into by the defendants, if there was such a conspiracy, was to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses or representations, to be effected by the postoffice establishment of the United States." (Tr. p. 241, 242).

And also as follows:

"The defendants have each entered a plea of not guilty. This plea is a denial of every material allegation in the indictment, and imposes upon the Government the burden of proving each and all of these to your satisfaction, beyond a reasonable doubt, before you will be justified in returning a verdict in its favor.

"Now, the material allegations in brief are, first, that there was a conspiracy, agreement, or understanding upon the part of the defendants; second, that such conspiracy was to devise the particular scheme to defraud set out in the indictment; and, third, that it was a part of the understanding and agreement that the postoffice establishment of the United States was to be used for the purpose of executing the scheme. It is therefore incumbent on the Government to prove, not only that the defendants conspired together to devise the particular scheme set out in the indictment, but that it was a part of such agreement or conspiracy that the scheme should be executed by the use of the postoffice establishment of the United States; and if as to any one or more of the defendants the Government has failed to prove any one or more of the elements necessary to constitute the crime charged, it is your duty to find such defendant or defendants not guilty." (Tr. p. 245, 6).

And also as follows:

"With reference to the evidence that the price of the stock was raised at intervals, if you find that it was done in the honest belief at the time that the progress of the affairs of the company justified such raise, and that the stock was of

the value of the increased price, though such belief may not have been justified by the then condition of the enterprise as indicated by subsequent events, you cannot find the defendants guilty because they proved to be mistaken about that." (Tr. p. 250).

And also as follows:

"The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question of your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be

determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declarations were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions." (Tr. p. 250, 251.)

And also as follows:

"The indictment also charges that it was the purpose or intent of the defendants to defraud the persons named in the indictment, and the public generally, out of their money. The law presumes that every person intends the natural and probable consequence of his own act, and if you believe from the evidence, and beyond a reasonable doubt, that the defendants, or any two of them, conspired to do the things named in the indictment, substantially in the manner and form as therein set out, and that it was the natural and probable consequence of their acts that purchasers of stock of the Cashier Company would be defrauded, then you would be justified in finding that it was the intent of such defendants so entering into the conspiracy, if there was a conspiracy, to defraud the persons named." (Tr. p. 252).

And also as follows:

"While circumstantial evidence is admissible and competent to establish a fraudulent intent, it is equally admissible and competent for the purpose of establishing good faith and honesty of purpose, or the non-existence of a fraudulent intent, and it is for you to say in this case, from all the facts and circumstances, whether the defendants entered into a conspiracy to devise a scheme and artifice for the purpose of defrauding those with whom they might deal, as charged in the indictment, or whether they acted in good faith. They are not on trial for evolving or devising an improvident or impracticable scheme, even though you should find their plan to be such. Nor are they on trial for mere errors of judgment. They are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the Government to prove to your satisfaction, beyond a reasonable doubt. And where, as in this case, circumstantial evidence is relied on, the circumstances themselves must be proven, to the satisfaction of the jury and beyond all reasonable doubt, and when so proven, they must not only be consistent with the main fact in issue, namely, the guilt of the defendants, but they must be inconsistent with every other rational hypothesis. The

question for your determination is whether the defendants were acting in good faith in the sale and disposition of the stock of the corporation with which they were connected, or whether they were using such corporation and its business as a basis for a fraudulent scheme. (Tr. p. 258, 259).

And also as follows:

"Now, gentlemen, this is a criminal case. The defendants have each entered a plea of not guilty, and, as I have said to you, that imposes upon the Government the duty of proving every material allegation necessary to constitute the crime, to your satisfaction beyond a reasonable doubt, before you can convict.

"When I have said heretofore in these instructions that a certain fact must be established by the Government, or a certain fact must be proven before you are justified in finding a verdict of guilty, I have meant always that it must be proven to your satisfaction beyond a reasonable doubt.

"The defendants, and each of them, are presumed to be innocent of this charge. This presumption is not a mere fiction which can be disregarded at pleasure. It is a substantial part of the criminal law of the country, and continues and abides with the defendants throughout the trial

until overcome by the testimony. They are not required by law to prove their innocence. The burden is upon the Government to prove their guilt, and that beyond a reasonable doubt." (Tr. p. 264, 265).

"You are exclusive judges, gentlemen, of the credibility of the witnesses and the weight to be given to their testimony. You are also the exclusive judges of all questions of fact, and if at any time during the trial the court has intimated its views concerning any disputed question of fact, or the testimony of any witness, you are to disregard it unless it conforms to your own understanding. (Tr. p. 265, 266).

With reference to the good intent actuating the DEFENDANTS the following is all of the evidence appearing in the bill of exceptions:

"There was evidence tending to show that about January, 1914, the defendant Menefee, and the other officers and directors of the United States Cashier Company, finding that the manufacture of the machines at Portland, where a factory had been established and had been in operation, was not satisfactory and economical, and that it lacked capital, caused to be organized and incorporated the International Money Machine Company, at Terre Haute, Indiana, and had pro-

cured additional subscriptions to the capital stock of that corporation; that an arrangement had been made by which the United States Cashier Company transferred to the International Company substantially all of its assets in Oregon, and had effected a contract with the International Company and promoters, by which the United States Cashier Company received something more than fifty per cent of the paid up stock in the International Company, and that the design and purpose of the defendants and officers of the United States Cashier Company was to continue the manufacture of the machines which they had commenced to manufacture and to conduct the business in Terre Haute, Indiana, and that that Company had proceeded, and at the time of the trial was proceeding to manufacture and sell one of the machines involved, and for which an application for a patent was pending to the International Money Machine Company. One of the machines recently manufactured by the Indiana Company was used in evidence and demonstrated in the presence of the jury to show its working.

"And there was evidence tending to show that the assignments made of the applications and patents by the several persons named in the foregoing testimony had been made by the applicants

or by the Cashier Company to the International Money Machine Company as a part of the assets of the Cashier Company, under the arrangements and contract hereinbefore referred to." (Tr. p. 230, 231).

I have tried in this statement of the facts to present the clear and concise statement and recital required by the rules. It is difficult to obtain a complete understanding of the record without a careful recitation of it all because the trial was so long and tedious that the bill of exceptions cannot in reality be shortened to any extent without an elimination of material testimony. I believe, however, that the foregoing statement will be accepted as showing the material testimony and proceedings upon which the three groups of assignments of error are based.

## ARGUMENT.

The record in this case discloses abundant evidence to justify a verdict of guilty upon each, every and all of the separate charges of fraud detailed in the indictment. Taking into consideration the length of the trial, the many charges of fraud alleged and proven, the large number of witnesses examined, the long list of exhibits introduced and read in evidence, and the thoroughness of the instructions to the jury, the record presents a remarkably small number of assignments of error, upon which reversal is sought.

It appears from the bill of exceptions that by virtue of the false and fraudulent representations made by the appellants they collected from the public on account of the sale of the capital stock of the United States Cashier Company the sum of $760,165; and disbursed over $400,000 to agents as commissions upon the sale of the stock (Transcript of Record, p. 168); that the defendants LeMonn and Menefee each received ten per cent of all amounts received for the sale of said stock and each of the agents received a further and additional commission of thirty per cent on account of said sales; that on account of said fraudulent representations of said appellants, the said company received during its short existence in cash and property on account of the sales of

said capital stock, approximately $1,500,000, and gave to the stockholders nothing of value in exchange therefor.

This is not a case where any evidence offered to establish innocence was excluded, but reversal is sought upon three grounds, viz:

1. That certain testimony given by the witness Oviatt was inadmissible;

2. That certain testimony given by the witness Sewall was inadmissible;

3. That the court erred in giving three instructions to the jury.

We will hereinafter fully and completely answer the assignments of error made by the appellants and confidently feel that the court will conclude that no error has been committed. No case of any considerable duration has ever been tried where astute counsel cannot pick out some action of the court and argue with more or less plausibility that there has been error committed.

We understand the well established rule to be that error complained of must have been prejudicial to the appellants to warrant reversal, and must have been such that the appellate court can affirmatively say prevented a fair and impartial trial; this legal proposition is well settled in the federal courts.

Agnew vs. United States, 165 U. S. 36-44.
Brown vs. United States, 142 Fed. 1-4.
Bettman vs. United States, 224 Fed. 819-832.
Van Deusen vs. United States, 151 Fed. 989-992.
Milby vs. United States, 120 Fed. 1-5.
Hoogendorn vs. Daniel, 202 Fed. 431-433 (C. C. A. 9th).

In the case of the State of Kansas vs. Durein (78 Pac. 152-154) the state supreme court, in passing upon the various assignments of error, said:

> "The record cannot be interpreted to show error if it is susceptible of reasonable interpretation to the contrary."

This case was appealed to the Supreme Court of the United States, and the decision was there affirmed per curiam (Durein vs. State of Kansas, 208 U. S. 613).

Keeping this well established rule in mind, we preface our argument, in the nature of a demurrer to the assignments of error, with the contention that the alleged errors complained of were not prejudicial to the defendant.

The case of Myers vs. United States, 223 Fed. 919, recently decided by the Circuit Court of Appeals of the second circuit, is in point. We quote from page 925:

> "The longer the trial the more improper incidents of this sort there may be. Also in a long

trial there will be occasions when some piece of competent testimony is excluded; if it is unimportant, if it can be plainly seen that its admission could not possibly have changed the result, such exclusion will not constitute reversible error. We do not find it necessary separately to discuss the few instances referred to where testimony was excluded, because the case proved was so plain and convincing that it was manifest the verdict came, not because of any prejudice, but because intelligent jurors could reach no other conclusion. Although the case was confused by a multitude of separate charges of manifold fraudulent statements, by a mass of testimony which ran to inordinate length, by controversies as to this, that, or the other detail of the physical and financial condition of these various mining companies and properties, there is one proposition established beyond any peradventure—defendants invited people to buy "treasury stock," and when the invitation was accepted and the money paid they gave to the persons they had induced to purchase, not treasury stock, but their own personal stock. That this is fraud of the sort contemplated by the statute under which the indictments were found is settled by our opinion in Wilson vs. U. S. (Aug. 20, 1911), 190 Fed. 427, 111 C. C. A. 231, where we held that it was fraud, although the

persons who thus palmed off their personal stock loaned the proceeds of the sale to the company. With that species of fraud shown, it is unnecessary to go into the details of controversies as to the truth or falsehood of glittering statements as to the condition of the properties whose stocks defendants were offering for sale.

This particular fraud was not only proved, but was proved in such a way that no help was needed from the instances of other false statements with which the record is filled. It was proved by defendant's own circulars, by their signed letters, by their admissions on the stand, by their counsel's admissions on the trial, and indeed, practically in this court, because nowhere in the brief of 115 pages is there a single suggestion that they did not unload their own personal holdings on persons whom they induced to believe that they were purchasing treasury stock. With this controlling fact clearly established, it is idle to discuss whether any other misleading representations were or were not made, or what the prospects of the various properties were, or whether some particular bit of evidence might induce a belief that defendants were unprincipled men. Irrespective of all the other testimony and with the conceded facts before them as to sale of stock falsely alleged to be "treasury stock," the jury

would be bound to find that defendants had devised a scheme to defraud, if they were intelligent and conscientious. A man who plans to dispose of his individual stock to another by representing that it is treasury stock, so that the purchaser will suppose that the money he pays for it will pass directly to the company, instead of going into the seller's pocket, has devised a scheme to defraud. When he has effected the sale through such misrepresentations he has defrauded his neighbor; and it makes no difference under this statute what he does with the proceeds of his fraud, the devising of the scheme is enough—plus, of course, the use of the mails. That in this case defendants used the mails in furtherance of their scheme is not, so far as we know, disputed. Every element of the statutory offense has been proved and stands practically undisputed. Under such circumstances only some glaring and obviously harmful error would justify a reversal."

The case at bar bears a very close resemblance to what was considered by the court in the case of Myers vs. United States, supra, as the most important, and indeed, the controlling fact in the case. The appellants, in the case at bar, made (among others) the following mis-

representation: We quote from the transcript of record at page 115:

> "That a certain large amount of the capital stock of said corporation, which said stock would be offered for sale to the said INVESTORS and to divers other persons and the public generally, belonged to and was the property of the said corporation, and that the money derived from the sale thereof would be by said corporation invested and used in such a manner as to increase the assets of said corporation, and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines."

And also from the transcript of record at page 118:

> "That in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, a very large amount of the shares of stock of said corporation, which THE DEFENDANTS were to represent as being the property of the said corporation, consisted of shares of stock owned by THE DEFENDANTS and all of the sums of money and all of the property received on ac-

count of the sale thereof would be appropriated by THE DEFENDANTS and none of the same or any part thereof would be paid into the treasury of the said corporation, to be used by it, either for increasing the assets of said corporation, or otherwise."

It is stipulated by counsel and certified by the court that there was evidence offered and received which tended to prove all of the statements set out in the bill of exceptions. It is further certified that the bill of exceptions contains all of the evidence offered and admitted relevant to or necessary to an understanding of the objections and exceptions.

We therefore submit that if the court shall follow the rule in Myers vs. United States, supra, the inquiry might well be ended here.

In the Myers case the court held that the appellants, having disposed of capital stock upon the representation that the proceeds were to go into the treasury, whereas in truth and in fact the said proceeds were to be used by the vendors for their own purposes, this constituted such a clear case of fraud that an appellate court would not reverse a judgment of conviction except on account of a glaring and obviously harmful error. We quote from page 925 of the opinion:

"A man who plans to dispose of his individual

> stock to another by representing that it is treasury stock so that the purchaser will suppose that the money he pays for it will pass directly to the company instead of going into the seller's pocket, has devised a scheme to defraud. When he has effected the sale through such misrepresentations he has defrauded his neighbor. * * * *
> Under such circumstances only some glaring and obviously harmful error would justify a reversal."

To the same general effect that where guilt is plain and it clearly appears that the conviction was right, the court will not reverse a case unless error complained of is clearly shown to have been prejudicial, we cite the following additional authorities:

> Wesoky vs. United States, 175 Fed. 333.
> Morse vs. United States, 174 Fed. 539-544.
> Lee Dock vs. United States, 224 Fed. 431.

## ASSIGNMENTS OF ERROR I, II AND III.

These assignments are all based upon the action of the court in admitting certain testimony given by the witness Nelson C. Ovaitt. As to these assignments of error, the contention of the government is:

1. That the testimony given by Oviatt was admissible;

2. That this testimony became competent by subsequent testimony;

3. That this testimony was admissible for the purpose of showing an intent to defraud;

4. That at the time this testimony was introduced it was competent against the defendant Bilyeu who was then on trial, and when this defendant, at the close of all the testimony, was discharged by the court, his co-defendants should have then requested the court to withdraw it from the consideration of the jury, in the event they then believed that it was inadmissible against them;

5. That on account of the statement made by counsel for the appellants as the same is set out at page 175 and 176 of the transcript of record, the appellants cannot now take advantage of their exception;

6. That there was no motion made by the appellants at the trial to strike out this testimony, for which reason they are not in a position to urge that error was committed;

7. That by carefully prepared requests for instructions, the appellants requested the trial court to limit the effect of certain evidence, which requests were granted by the court; if the appellants had desired the trial court to further limit the effect of the Ovaitt testimony or to take it from the consideration of the jury they should have requested a timely instruction to that effect;

8. That if error were committed by the trial court in admitting this testimony, such error was cured by the instructions of the court;

These eight propositions we will now consider in the order named above:

## 1. THE TESTIMONY GIVEN BY OVAITT WAS CLEARLY ADMISSIBLE:

The defendants Menefee and LeMonn had inserted advertisements in three newspapers published at Portland, Oregon, and more than 25,000 copies of these advertisements had been sent out through the mail (Transcript of Record, p. 123). These advertisements and each, every and all thereof were full page display advertisements (Transcript of Record, p. 136). A reference to Government's Exhibit No. 64, being a circular letter of date June 21, 1911, written by LeMonn to the salesmen of the company, and Government Exhibit No. 56 being a letter of date October 11, 1911, written by LeMonn to Messrs. Hunter and White, shows that these advertisements were not only inserted in the newspapers, but the papers themselves were forwarded for the purpose of influencing prospective purchasers to buy the stock of the corporation. Among the many false statements contained in these advertisements are the following:

a. The value of the patent rights for the Bilyeu Au-

tomatic Cashier is almost priceless. (Transcript of Record, p. 124).

b. The company is to pay an annual dividend of 100 per cent. (Transcript of Record, p. 125).

c. The United States Cashier Company owns and controls four machines, any one of which would insure big returns, and the future profit of the said company is assured. (Transcript of Record, p. 126.)

d. Methods of handling money will be revolutionized. (Transcript of Record, p. 128).

e. Extensive production of marvelous mechanical brain. (Transcript of Record, p. 128).

f. The machines of the United States Cashier Company promise to outrival the typewriter in usefulness. (Transcript of Record, p. 128).

g. The United States Cashier Company owns the patents to its Change Computing Machine, its Bank Cashier, its Lightning Change Maker, its Currency Paying machine and its New Style Adding Machine. Owning these patents, the future profit of said company is impossible of calculation. (Transcript of Record, p. 129).

h. The United States Cashier Company not only controls one of the above machines, any one of which would return big profits, but owns and controls patents

and rights to all of them. (Transcript of Record, p. 132).

i. These machines are the product of the United States Cashier Company. (Transcript of Record, p. 133).

j. The patent rights of these machines are virtually priceless and the demand for such money saving devices is unlimited. (Transcript of Record, p. 135).

That the proof showed these representations, and each, every and all thereof to be false and untrue, appears in the narrative statement of the bill of exceptions at pages 116 to 119, inclusive. It further appears from the testimony of the witness E. D. Sewall (Transcript of Record, p. 188), that at the time these advertisements were published and mailed the applications for said patents were not then on file.

On September 15, 1911, John F. Robb, the patent attorney for the United States Cashier Company, had written to the defendant Menefee as follows:

> "In conclusion, I beg to state that thus far in my infringement research, I have located one patent which is clearly infringed by the use of a certain feature of the change machine. The patent is within five years of expiration, and was granted to a foreigner. It is my purpose to consider carefully the desirability of acquiring the above

patent in order to strengthen your protection, but will advice fully on this subject when I forward infringement report." (Transcript of Record, p. 165).

On October 5, 1911, the patent attorney had written to the United States Cashier Company as follows:

"I have not received as yet further advices supplementing Mr. Overlin's night letter answered on the 26th of Sept. You will understand that I was interrupted in the infringement work by instructions in said night letter and would like to know whether the report covering my work completed to date is to be sent or is to be delayed until some further developments? I think this of grave importance because in the infringement search I have run across certain patents controlled by the National Cash Register Company which will affect our computing machine. Indeed, I believe that the portion of my report directed to the above matter may be the most important development of my work because it is probable that a consultation of your mechanical department and the officers of your company may have to be called to determine upon your future operations in the computing machine line. Unless I run across some other patents bearing on this line, the National Cash Register Company people have

protection that may seriously interfere with us." (Transcript of Record, p. 165, 166).

Notwithstanding the receipt of this notification relative to infringements it appears from the record that on October 13, 1911, in a circular letter issued by the defendant Menefee he made the following statement:

> "We also feel gratified in announcing that we are not only the absolute owners of our patents, but that we have not had the slightest intimation of trouble from any source in the way of infringement or otherwise. The patent office at Washington, D. C., could not give us a single citation wherein our patents were infringing on any other patents previously granted and we have also had made extensive research by the ablest patent attorn*ies* in Washington, D. C., and they have assured us that we have full protection for all time to come." (Transcript of Record, p. 164).

It further appears from the correspondence set out at page 166 and 167 of the transcript of record that Menefee, in writing to Robb, requested Robb to write a prospective purchaser and tell him that there was no danger of infringement; that Robb wrote the letter to the prospective investor and also immediately wrote Menefee that he could not advise the purchaser that there was no danger of infringement and for this reason had not mentioned the matter at all.

The defendant Bilyeu was a duly licensed and regularly admitted patent attorney (Transcript of Record p. 163), from which fact we may assume that he would realize the danger of trying to put a machine upon the market the manufacture of which would clearly infringe the rights of another. We quote from pages 161, 162 and 163 of the transcript of record:

> "And the plaintiff offered testimony which was received and which tended to prove that the American Cash Record Company was a corporation organized and existing under the laws of the state of Washington, and that during all of the times mentioned, specified, stated in the indictment, the defendant, Thomas Bilyeu, was the president and a director thereof, and was the owner of one-fourth of its capital stock; that the United States Cashier Company, on September 28, 1910, purchased from the American Cash Record Company applications for patent No. 555,552; No. 519,489 and No. 522,240, for a purchase price of $200,000 in cash and $60,000 of the stock of the United States Cashier Company; that from time to time thereafter and up to and including the year 1913, the United States Cashier Company made many cash payments to the American Cash Record Company and to the defendant, Thomas Bilyeu, and that the defendant

Bilyeu, during these years, received in cash from the United States Cashier Company, on account of said contract, more than the sum of $50,000; that in November, 1911, the United States Cashier Company purchased from the defendant Thomas Bilyeu certain patent rights covering the same applications for the republic of Mexico for the sum of $15,000, but that the United States Cashier Company never did anything with any of these rights; that in June, 1912, the United States Cashier Company purchased from the defendant Bilyeu and one Overlin the rights to a currency machine that had been built by Overlin. The consideration of this purchase was that the company was to sell for Bilyeu and Overlin 1600 shares of stock owned by them and to pay them for the stock at the rate of $12.50 per share.

"There was evidence tending to show that the defendant Bilyeu saw the advertisements in the Oregonian, Journal and Telegram referred to in this bill. The plaintiff offered evidence tending to prove that upon one occasion the defendant Bilyeu had assisted in the sale of the stock of the United States Cashier Company and had represented to the purchaser that the company owned the patents to all the machines which it was advertising and selling. The plaintiff offered evidence tending to prove that during all of the times

mentioned in the indictment the defendant Bilyeu was a duly licensed and regularly admitted patent attorney.

But Mr. Bilyeu, being called as a witness and sworn, denied the foregoing facts, so far as they related to the sale of any stock by Bilyeu." (Transcript of Record, p. 161, 162, 163).

The portion of the proof quoted above disputed by the defendant Bilyeu was his participation in the sale of some of the capital stock. (Transcript of Record, page 163).

Bilyeu had transferred his alleged patent rights to the United States Cashier Company and had received in cash alone on account of the transfer more than the sum of $50,000. (Transcript of Record, page 162).

With this statement of the evidence we now proceed to a discussion of the competency and relevancy of the Oviatt testimony as the same is set out in the transcript of record at pages 170 to 184 thereof.

Oviatt testified without objection that he was engaged in the manufacture of a machine called the payograph and was president of the Payograph Company; that he was acquainted with the defendant Bilyeu; that he met him first in the year 1909 in Portland; that he, Oviatt, had devised the principles of a coin paying machine and had disclosed these principles to Bilyeu; that

Bilyeu agreed with him that they would divide the results of the venture, the witness turning over to Bilyeu his ideas and Bilyeu agreeing to proceed with the development of the machine and to build a model thereof.

The purpose of this testimony was explained by the district attorney and his explanation is set out at page 171 of the transcript of record.

The effect of this testimony was by the court limited to the good or bad faith of the defendants. (Transcript of Record, p, 175).

We contend that the testimony hereinabove set out was clearly admissible for the purpose of showing an intent upon the part of Bilyeu to defraud. It tended to prove that he was not the inventor of one of the machines which he sold to his co-defendants. It tended to prove that he knew that whenever an attempt to market this machine should be made that the owner of the application for the patent would undoubtedly experience difficulty with the owner of the Oviatt machine and this, as we will subsequently show in the brief, is exactly what happened.

It must be borne in mind that at the time this evidence was introduced the defendant Bilyeu was on trial, as the court did not direct a verdict in his favor until after all of the evidence had been introduced upon both sides. (Transcript of Record, p, 163).

The remainder of the testimony of the witness Oviatt against which objection is here urged was as follows:

We refer to the transcript of record at pages 178 to 184, inclusive.

Oviatt further testified that he built a machine known as the payograph, the principal feature of which consisted in this: it was a coin paying device connected to an adding machine in such a way that the adding machine could be used either with or without the coin paying mechanism, this being detachable. Upon cross examination Oviatt testified (Transcript of Record, p. 183), that there was an interference in the patent office between the bank cashier of the United States Cashier Company and this device of the Payograph Company. Oviatt's application for a patent upon this feature was filed long prior to the application of the United States Cashier Company. (Transcript of Record, p. 178, 188, 211, 212.)

The defendant LeMonn made a visit east in the early part of the year 1912 and learned of the manufacture of the payograph. (Transcript of Record, p. 176).

By reference to Government's Exhibit No. 162, it is shown that on January 7, 1912, LeMonn wrote Menefee in part as follows:

> "There is one thing that I learned from the paymaster, that was of some information as well

as surprise to us, and that is, the Payograph Company, 915 Ford Building, Detroit, are constructing a payograph for pay rolls, etc., and for their registering, printing, and totalling mechanism, they make the claim that this payograph can be used in conjunction with either a Burroughs, Wales or Pike adding machine, by placing the adding machine selected over the key board or mechanism of the payograph, and Mr. Meyers, who had been at Detroit investigating same, seemed to be very favorably impressed with it, and he should know something about it, as they tried out a Twin Brandt machine which they returned, as they could not use it to advantage. It is hardly necessary for me to state that I will make a very thorough investigation of this payograph machine, along the lines of how soon they will be able to market same, the work it will accomplish, and their facilities for manufacturing same, and if it is as good as it seems to be, it may mean that we really have a competitor that is now ready for the market, and if they can use it in conjunction with their adding machine, it should sell as I think they only ask about $250 for same. This may mean that we will want to talk over the stock selling problem along the lines of this competitor. In other words, don't think it would be wise to have the directors place more of the com-

pany's stock on sale at this time, until we have gotten rid of some of this stock on hand, which we have been forced to buy up, etc."

On January 10, 1912, LeMonn, having seen a demonstration of the payograph (Transcript of Record, p. 179), sent Menefee the following telegram, which was received in evidence and marked as Government's Exhibit No. 163:

"Advance to thirty Monday or twenty second sure Sell all you can of repurchased stock by us Ovaitt is president of payograph machine which being manufactured by contract and looks like winner. Clazon states has positively forty thousand assured for Friday will return to settle deal in Chicago."

It appears from an examination of the corporate minute book of the United States Cashier Company covering that period of time during January, 1912, that the board of directors followed the advice of Mr. LeMonn. It appears from the transcript of record at page 176 that the defendants Menefee and Campbell at Portland, subsequent to the receipt of the telegram hereinabove set out, caused the board of directors of the United States Cashier Company to pass a resolution withdrawing the company's stock from the market and authorizing Menefee, LeMonn and Campbell to sell their own

personal stock with the sales organization and the demonstration machines of the company.

In a letter written by Menefee on June 27, 1913, (see Government's Exhibit No. 367) the statement is made:

> "We have known of this payograph proposition for the last three years and also have had quite full and complete information in regard to its state of development and also the design."

From the above statement it clearly appears that Menefee knew of the payograph machine at least as early as June, 1910. Then at the time the advertisements were inserted in the papers he knew that the United States Cashier Company had a dangerous competitor, and that the payograph machine would, in all human probability, stand as an absolute bar to the financial success of the company of which he was president.

The rest of the testimony of Ovaitt is in relation to his dealings with the defendants Bilyeu and Menefee and the attempt made by these defendants in the year 1913 to purchase from him the patent rights of the payograph to the end that infringement proceedings might be avoided.

Menefee, LeMonn, Campbell, Bonnewell and Todd were engaged, during all of these times, in the sale of the capital stock of the United States Cashier Company

at exorbitant prices to the public. The company could not hope for success unless it were permitted to have a monopoly upon the sale of its machines. Menefee and Bilyeu knew that the owners of the payograph machine could prevent the manufacture and sale of the machine of the United States Cashier Company. Knowing this state of facts Menefee proceeded to defraud the public by continuing to sell the stock of the United States Cashier Company and when they faced the stern realization that the payograph was about to go on the market, Bilyeu, having known of the danger since 1909, and Menefee, having known of it since 1910, the directors proceeded without a thought of the interests of the other stockholders, to unload their own personal holdings.

The indictment alleged (Transcript of Record, p. 27, 28) and the proof showed (Transcript of Record, p. 122, 123), that the conspiracy was to and did continue from January 1, 1910, to January 1, 1915.

Under any view of the evidence, the testimony given by the witness Ovaitt was clearly admissible.

That the payograph machine did present a serious obstacle to the success of the United States Cashier Company, if said company had ever intended to manufacture or sell their machines is conclusively shown in the letter written by Robb to Menefee of date October 17, 1913. This letter was introduced in evidence by the appellants, is marked as Defendant's Exhibit I-3-h, and is made a

part of the bill of exceptions by the stipulation and order of date March 23, 1916. This letter is as follows:

"In Bilyeu's telegram he suggests that you advise me of Oviatt's methods. To tell the truth I only know of Oviatt's existence through Mr. LeMonn, who told me about his Detroit company, early in 1912. I had the impression at that time that LeMonn indicated that Oviatt was the first man to propose the idea of the combination of a paying machine with an ordinary adding machine so the two could operate conjointly or independently. One thing is true, according to the English patent of Oviatt, he claims a filing date for his U. S. application as of August 31, 1911, almost a year ahead of us. The burden will therefore be on us to beat him out in this country even and the indications are that we would fail unless we really can prove that Oviatt stole the idea from us. * * * Nowithstanding that Mr. Bilyeu suggests an under-estimation of Oviatt's English patent. I cannot agree with his position. I do not think that Oviatt's machine is a commercial machine, yet I have contended before the patent office and indicated to you that I considered the broad claims on the idea of our combination machine, and Oviatt's equivalent machine to be of tremendous importance and

value. For me now to agree with Mr. Bilyeu would be absolutely inconsistent with my previous position and with my honest beliefs in the premises. Owing to my legal experience, I am not so much concerned with the commercial feasibility of Oviatt's machine as I am with the fact, on your behalf, that he has the broad claim which covers our cashier machine. This claim reads as follows:

" 'A combination machine characterized in that it is so connected to a calculating machine that by means suitably connected rods adapted to be coupled and uncoupled, the paying and calculating machine can be utilized both conjointly as a unitary structure, and separately, as two independent machines.'

"Now I will quote my first and perhaps broadest claim in our English application in controversy:

" 'A calculating and money handling machine in which the calculating mechanism is a complete machine in itself, operable independently of the money handling mechanism, characterized by the provision of means to cause conjoint operation of the calculating and money handling instrumentalities, or operation of the calculating means alone.'

"True, my claim is couched in possibly broad-

er terms, but it will be evident to you that Oviatt's attorney and myself were covering the identical same principle. In our case we have about twenty-five claims while Oviatt got eight or nine. This is not very material because the thing of crucial import is the broad claim.

"Thus it is that I am convinced more and more as I think over this matter that we could be certainly embarrassed if we attempted to argue to your Londoners that Oviatt's machine covers an uncommercial and general idea when from the patentable standpoint of protection such a proposition cuts no ice whatever."

Note the statement in the letter:

"The burden will therefore be on us to beat him out in this country even and the indications are that we would fail unless we really can prove that Oviatt stole the idea from us."

This statement would of itself make the Oviatt testimony admissible.

The objection of the appellants to the Oviatt testimony seems to be directed to the fact that in the indictment there is no specific negative to the alleged falsity of the representation made by the appellants that the Cashier Company owned the patent to the bank cashier machine; at the trial the appellants attempted to take

advantage of this point and to prevent the introduction of any proof to the effect that the Cashier Company did not in fact own any patent to this machine. It has been held by the appellate court of this circuit that it is not necessary to negative a specific allegation of falsity in a mail fraud indictment.

EWING VS. U. S., 136 FED. 53-56.

The same objection was made in this case; in ruling upon this question Judge Gilbert, speaking for the court said:

> "The indictment alleges that the representations were false and untrue in fact, and were well known by the said defendants to be utterly false and untrue in fact. This, it is said, is a mere statement of a conclusion of law and is not sufficient * * * The defendant should not be permitted to escape the just penalty of the law through defects of form, if such defects there were, which could not have prejudiced him. These considerations alone are sufficient to dispose of such an objection made for the first time in an appellate court. But we find no defect in the indictment in the respect specified. It is true, and counsel present authorities which so hold, that in drawing an indictment for an offense the substance of which is matter falsely sworn to, or fraud perpetrated by means of matter falsely represented, it

> is necessary to allege not only that such matter was false, but the pleader must go further and allege the truth as it is in the facts. But here the gist of the offense is not the obtaining of money by means of false representations. It is a scheme to use the mails of the United States in furtherance of a purpose to defraud, and an act done to carry out the same. It was such use of the mails that the statute was intended to prevent. The fraud contemplated by the law need not necessarily be a fraud at common law or by statute."

Applying this rule of law to the case at bar, the testimony of Mr. Oviatt, notwithstanding the fact that the indictment failed to specifically negative the ownership of the bank cashier machine, was admissible. The indictment in this respect bears so close a relation to the one analyzed by Judge Gilbert in the case last above quoted that no material distinction can be drawn between the two. The allegation in the indictment in the case at bar is as follows: (Transcript of Record, p. 13).

> "The said defendants * * * * would falsely and fraudulently and by means of printed advertisements, to be by the said defendants * * * inserted in newspapers * * * and by words to be orally spoken by the said defendants * * * represent, pretend and promise that the said corporation * * * owned the pat-

> ents to a certain * * * bank cashier machine."

In the case of MORRIS vs. UNITED STATES, 229 FED. 516-520, the court said:

> "The tendency of most of the courts at this date and especially the Supreme Court of the United States, is to disregard technicalities which can in no way be prejudicial."

The argument of learned counsel for the appellants (Appellants' brief, pp. 60-64, inclusive) is interesting and impressive for two reasons: The earnest and decisive manner of its presentation and the recognized and admitted ability of the lawyer who advances it. Without these two qualities it would seem devoid of merit. It presents the following theory:

The allegation of representation of ownership of the bank cashier not being specifically negatived, the Cashier Company by this allegation becomes the owner of a patent which was never issued, whereas without the said allegation the company would not have owned it. The answer to this is that the Cashier Company in truth and in fact did not own any patent to this machine and no patent has ever issued. As the entire argument is based on this false premise it establishes nothing except that counsel for appellants is both earnest, ingenious and resourceful.

2. THE EVIDENCE GIVEN BY THE WITNESS OVIATT WAS MADE COMPETENT BY SUBSEQUENT TESTIMONY:

If the court should be of the opinion that the evidence of Oviatt, at the time it was offered, was incompetent, then its close connection between the subsequent testimony set out in the transcript of record at pages 181 to 182 would render the testimony admissible and its admission not error.

We cite the following authorities in support of this contention:

The case of St. Clair vs. United States, 154 U. S. 134, 149, was a case wherein three defendants were jointly charged with the crime of murder.

Evidence relating to the acts, appearance, and declarations of two of the defendants was admitted over the objection that the defendants were not charged as co-conspirators. The Supreme Court said:

> "The evidence is not, for that reason, to be rejected. * * * The acts, appearances, and declarations of either, if part of the res gestae, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so in-

terwoven with each other and with the principal fact, that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence."

The case of **Jones vs. United States, 179 Fed. 584-604**, is the famous criminal case arising from Oregon against Willard Jones, et al. Evidence competent and relevant against one of the defendants was objected to because it tended to establish another offense on the part of the defendant, but the court held that the testimony did not become inadmissible on account of that fact.

In the case of **Sprinkle vs. United States, 141 Fed. 811-816**, five defendants were jointly indicted for a violation of the internal revenue laws; the court, in passing upon objection to evidence given as to the separate conduct of individual defendants, said:

"Ought not the acts, conduct, and doings of each of the defendants—not their statements, declarations, or admissions necessarily, but what they or either of them may have done—in and about any material transaction forming a necessary part of the business in hand, whereby the Government was defrauded of its revenue, manifestly be submitted to the jury, with a view of determining the bona fides of their acts; that is,

their intent in the premises? They should, of course, be the necessary incidents of the litigated act, and such acts, incidents and doings as are necessarily and unconsciously associated with the crime as committed."

3. THE TESTIMONY WAS ADMISSIBLE FOR THE PURPOSE OF SHOWING AN INTENT TO DEFRAUD:

This testimony shows that Bilyeu defrauded the public as it appears that notwithstanding the fact that he saw the false advertisements in all the newspapers he permitted the sale of the capital stock of the United States Cashier Company to proceed unchallenged, taking his toll to the extent of $50,000 in payment of alleged patent rights which were never his. (See Transcript of Record, pp. 162-163).

4. NO ERROR WAS COMMITTED BECAUSE NO REQUEST WAS MADE OF THE COURT TO LIMIT THE EFFECT OF THE OVIATT TESTIMONY BY PROPER INSTRUCTION TO THE JURY:

This contention we believe is unanswerable. Bilyeu was on trial at the time the testimony was introduced; undoubtedly the testimony was admissible as to him, and if his co-defendants had desired to have the effect of the testimony limited, the court should have been asked by timely request to have so limited it.

If it should be contended that Oviatt's testimony became inadmissible by reason of the fact that the court subsequently held that Bilyeu was not a conspirator, the defense cannot now complain because they did not ask the court to limit the effect of the testimony by proper instruction to the jury.

Van Deusen vs. United States, 151 Fed. 989-992.

This was a mail fraud case. The court permitted to remain in the record the remark of a witness, the greater portion of whose testimony was excluded, such remark not being responsive to any question and not having been called to the attention of the court except by a general motion at the close of the case to strike out all of the testimony of the witness. The refusal of the court to strike out all of this testimony was urged as a reason for reversal.

In this connection the court said:

> "But the attention of the court was not specifically called to this portion of the witness's testimony. The motion to strike out was to strike out the whole of the witness's testimony. Presumably, had this remark of the witness—a remark as already stated wholly irresponsive to any inquiry put—been called to the attention of the court, as something still standing in the record, a

motion to strike it out would have prevailed; for the court's mind on that subject had already been twice indicated. Nor can we infer that this testimony was referred to subsequently during the course of the trial; for in that case the court doubtless would have stricken it out as the other statements were stricken out. So that, these being the circumstances, the matter now objected to appears to have been one of those occurrences, that in a trial of considerable length are lost sight of, and exert no final effect upon the verdict—matters raked out of the record only under the closer inspection that preparations for a court of review brings on.

Now when a writ of error is predicated upon matter appearing in the record like this, the party who brings the writ must show that he has been reasonably specific in calling it to the attention of the trial court. He cannot be permitted to bring such matters to the surface for the first time in the court of review. That would be unfair, both to the court that tried the case, and to the general administration of criminal justice."

To the same effect is the case of Tevis vs. Ryan, 233 U. S. 273-288-289. The Supreme Court in this case had before it an action in which the plaintiffs were suing for damages. The lower court admitted in evidence a writ-

ten admission which contained certain insinuations and veiled charges of fraud to which the defendants took objection and exception. The court said:

> "It is sufficient, however, to say that the paper was introduced as evidence of a demand and was admissible for that purpose (in the absence of objection based on the time of its delivery) since it contained a notice that plaintiffs insisted that defendants should comply, as well as might then be done, with the provisions of the agreement. The fact (if it were a fact) that it also contained matters irrelevant to the demand, would not render the document inadmissible. *The proper course would have been for defendants to request an instruction limiting the effect that should be given to it by the jury;* or, if intending to insist that it came too late to constitute a proper demand, then to exclude the paper from consideration. The present objection was not properly raised at the trial." (Italics ours.)

The case of C. Vt. R. Co. vs. Soper, 59 Fed. 879-889, is an action at law by Soper against the railroad company for loss of a quantity of grain. The court in commenting upon an objection and exception taken to certain testimony admitted on the part of the plaintiff said:

> "It is frequently the right and the duty of the trial court to admit evidence which, when ad-

mitted, is not apparently relevant, upon the assurance of counsel that it will afterwards be connected. This relates to the order of a trial, but does not deprive the party against whom the evidence is offered of his just rights with reference to it. He may object to it on the ground of irrelevancy at the time it is offered, and, if not afterwards connected, move to have it stricken out; and, if not stricken out, he, by thus seasonably objecting at the outset, and seasonably renewing his objection, secures to himself a legal right to exceptions. * * * But there is nothing in the bill showing that the defendant below subsequently called the attention of the court to it anew; so that this statement in the bill is wholly ineffectual."

The case of Alexander vs. United States, 138 U. S. 353-355, was a murder case in which error was assigned to the ruling of the court limiting the number of challenges in drawing the jury. The defendant having made no objection at the time, the court, in defining the duty of counsel in this respect said:

"But the decisive answer to this assignment is, that the attention of the court does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel

> *seasonably* to call the attention of the court to any error in impanelling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception." (Italics ours.)

The case of Itow vs. United States, 223 Fed. 25-28, is a case recently decided by the Circuit Court of Appeals of this circuit and seems to us to be decisive. This was a murder case originating in Alaska. There were two defendants convicted. During the trial the court admitted in evidence a statement made by one defendant to the district attorney concerning circumstances surrounding the death of the decedent. This was assigned as error for the reason that it was not made in the presence of his co-defendant, and therefore was not competent against him. The prosecutor stated that he was only offering the evidence against the party making the admission, and the court held it to be admissible for that purpose. Notwithstanding the fact that the alleged error was not properly submitted to the court for which reason it might have been entirely disregarded, the court, on account of the importance of the case, examined carefully into the merits of the assignment and ruled as follows:

> "In such a case it is held that the court should instruct the jury to regard the statement as evidence against the defendant who made it, and

not against his co-defendant, and it has been held that, if the other wishes to be relieved from the influence of such evidence, he should ask for instruction limiting the effect thereof. In this case there was no request for such an instruction. We think there was no error in the admission of the statement for the purpose for which it was offered."

## 5. WHATEVER OBJECTION THE DEFENDANTS EVER MADE TO THE INTRODUCTION OF THE OVAITT TESTIMONY WAS WAIVED BY THEM AT THE TRIAL:

For the purpose of showing the exact manner in which the objection was made, the ruling of the court thereon, and the consent of these defendants thereto, we quote from the transcript of record at page 175:

"Whereupon the Court ruled upon the said objection in the following language: 'I think in view of the indictment, that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine. Further than that, I don't suppose in this trial that the validity of the patent that has been issued by the Government can be tried or determined. There is evidence in this case tending to show that Le Monn made a visit east along in 1912, and learned of this particular instrument,

and that it was being manufactured, and that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose, I think this testimony of their connection with this patent is material in this case, to show their good faith.'

"Thereupon counsel for the defendants said: 'I am content with this limitation, that these two matters will be instructed to the jury that the patent is (not) in controversy.'

"And the Court said: 'In this case I understand it is admitted in the indictment.'

"And thereupon Mr. Reames said to the Court: 'Before your Honor passes finally upon that, I would like to leave that part and pass on a little further, and offer it again this afternoon, and offer some authority upon it.'

"Whereupon the Court said: 'You can go on with the testimony, and later if it should be deemed material you can present the force and effect of it, but with that limitation, it will be admitted at this time.' "

Defendants at the trial thus waived by a statement

solemnly made in open court the right to rely upon the objection which is now urged.

6. NO MOTION BEING MADE TO STRIKE OUT THE OVAITT TESTIMONY THE DEFENDANTS CANNOT NOW CLAIM THAT IT WAS INADMISSIBLE:

We believe that the above proposition of law is elementary; especially should this rule be invoked where the evidence was admitted following the statement set out on pages 175 and 176 of the transcript of record.

Van Deusen vs. United States, 151 Fed. 989-992.

Tevis vs. Ryan, 233 U. S. 273-288-289.

Alexander vs. United States, 138 U. S. 353-355.

Itow vs. United States, 223 Fed. 25-28.

7. THE DEFENDANTS HAVING REQUESTED THE COURT TO LIMIT THE EFFECT OF CERTAIN EVIDENCE, THEIR FAILURE TO MAKE THE REQUEST REGARDING THE OVAITT TESTIMONY WOULD JUSTIFY THE COURT IN NOT CALLING SPECIAL ATTENTION TO THE MATTER:

The defendants' request for instructions are set out at pages 231 to 235, inclusive, of the transcript of record. An examination of these requests will disclose that the

defendants did ask in several instances, to have the effect of certain testimony relative to the patent situation limited in its scope; the court was justified in assuming that in those cases wherein the defendants desired to have the effect of the testimony limited, proper request had been made therefor, for which reason no request having been made to limit the effect of the Ovaitt testimony, no such instruction was desired by the defendant.

Van Deusen vs. United States, 151 Fed. 989-992.

8. ASSUMING FOR THE PURPOSE OF THE ARGUMENT THAT ERROR WAS COMMITTED IN THE ADMISSION OF THE OVAITT TESTIMONY, THIS ERROR WAS CURED BY THE INSTRUCTIONS OF THE COURT:

The following instruction was given by the Court to the jury: We quote from page 261 of the transcript of record:

> "One cannot be made a member of a conspiracy except by his own acts or declarations, and the acts and declarations of another are not evidence against him."

Hereafter in this brief in discussing the effect of the instruction given by the court withdrawing from the consideration of the jury the testimony of the witness

Sewall, we have cited authority which also supports the above proposition of law.

In the brief of the appellants which has just been submitted to us, it is urged that the admission of the Ovaitt testimony was prejudicial error; it is clear that counsel for the appellants have entirely overlooked and disregarded the fact that the indictment alleged (Transcript of Record, p. 27 and 28) and the proof showed (Transcript of Record, p. 122) that it was a part of the conspiracy that it should and would, and that in fact, it did, continue from September 1, 1910, until and including January 1, 1915, during all of which times it was continually in existence and in operation, and that during all of said times, the appellants continued to feloniously conspire, combine, confederate and agree together to commit the crime in the indictment set forth in detail.

Thus, it was alleged in the indictment and substantiated by proof that prior to, at the time of, and long subsequent to the visit of the defendant LeMonn, at the office of the Payograph Company; to the sending and receipt of his fraudulent telegram, and the action of the board of directors thereon; to the meeting of Menefee and Ovaitt; to the meeting of Menefee, Ovaitt and Bilyeu, and to the explicit notice given by Mr. Robb in his letter to Menefee of date October 17, 1913 (Defendant's Exhibit I-3-H), in which Mr. Menefee was told

plainly that with the payograph machine as a competitor for a patent the Cashier Company could not succeed; that these appellants continued to defraud the public by selling the stock of the United States Cashier Company upon the false representations that it owned the patents to its machines when in truth and in fact it did not; that the patents were priceless when they knew them to be worthless, and that the company was engaged in the business of manufacturing and selling machines notwithstanding the charge in the indictment and the proof at the trial that the business of the company was to sell and dispose of its capital stock. For these reasons alone, it was competent that the jury should know the entire history of the transaction.

## ASSIGNMENTS OF ERROR IV TO XVI INCLUSIVE.

These assignments are all based upon the ruling of the court in admitting certain testimony given by the patent expert, E. D. Sewall, to the effect that there had been issued by the United States patent office patents which would be infringed by the subsequent applications of the United States Cashier Company, and that said company had notice of the infringement. It is our contention that this testimony was competent and that no error was committed in receiving it, yet we respectfully suggest that the appellants are not in position to now

urge these assignments of error, because the court, upon their request so to do, withdrew said testimony from the consideration of the jury.

The appellants requested the court to instruct the jury as follows:

> "The fundamental question in this case is the good faith of the defendants in respect of the enterprise of manufacturing and selling the machines described in the indictment and in the evidence. If they honestly intended to establish a business to manufacture and to sell the machines, in the belief that the business would be profitable to the corporation and its stockholders, you cannot find them guilty of the charge in this indictment that the United States Cashier Company was not engaged in either the business of manufacturing or selling said machines or any thereof." (Transcript of Record, p. 232.)

And the appellants further requested the court to instruct the jury as follows:

> "You cannot decide in this case that the patent of Osborne or Lindelof or Cook dominated or affected injuriously any patent issued Bilyeu and Potter, or claims allowed by the Patent Department of the United States to the defendants or the United States Cashier Com-

pany or which were assigned to said Company." (Transcript of Record, p. 232.)

And the appellants further requested the court to instruct the jury as follows:

> "Any representations made by the defendants that they had procured a patent that they did in fact procure or had claims allowed that were in fact allowed, cannot be found by you to be a misrepresentation." (Transcript of Record, p. 232, 233.)

And the appellants further requested the court to instruct the jury as follows:

> "Bad faith or fraudulent misrepresentations cannot be imputed to defendants in respect of patents they in fact procured or in respect to claims that were in fact allowed because of claims of infringement of prior patents by other persons that were made or might be made, and there is no competent evidence in this case that any such infringement in fact exists." (Transcript of Record, p. 233.)

And the appellants further requested the court to instruct the jury as follows:

> "In respect to the last instruction, I instruct you that the opinion of the witness Sewell that the Osborne patent dominated the construction

of the defendants' patent or machines constructed thereunder, is not competent evidence in this case that any such infringement in fact exists." (Transcript of Record, p. 233.)

And the appellants further requested the court to instruct the jury as follows:

"Honest mistakes or errors of judgment in respect of patents or patent claims or patent situation cannot be imputed to defendants as evidence of bad faith or of a fraudulent purpose." (Transcript of Record, p. 234.)

And the appellants further requested the court to instruct the jury as follows:

"There is a presumption of law when patent is issued by the Department that it does not infringe any prior patent." (Transcript of Record, p. 234.)

And the appellants further requested the court to instruct the jury as follows:

"Expert evidence is not competent to rebut the prima facie presumption that the patents obtained by the defendants and the Cashier Company do not infringe the prior patents mentioned in the evidence, and you are to disregard the evidence of Mr. Sewall to that effect, and you are to find in accordance with the prima facie pre-

> sumption that the said prior patents are not infringed by any of the patents obtained by the defendants and the Cashier Company." (Transcript of Record, p. 235.)

And the appellants further requested the court to instruct the jury as follows:

> "The issuance of a patent by the Department is a decision of the officers of the Department charged with that duty, that the patent does not infringe any prior patent and the patentee, in accepting the patent, is not thereby guilty of bad faith, but on the contrary his good faith must be presumed." (Transcript of Record, p. 235.)

The appellants did not except to the action of the court in failing to give any of these requested instructions to the jury, and that said requested instructions were all given is shown by the following:

The court instructed the jury, in part, as follows:

> "But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and

owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent, and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindelof or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent pur-

pose, even if material, are not fraudulent. As I understand the testimony, it is admitted that at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case." (Transcript of Record, p. 247, 248, 249.)

And the court also instructed the jury as follows:

"Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief, as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the charge that the company was not intending to engage in either the business of manufacturing or selling such machines." (Transcript of Record, p. 249, 250.)

And the court also instructed the jury as follows:

"The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions." (Transcript of Record, p. 250, 251.)

In the case of Krause vs. United States, 147 Fed. 442-451-452, the defendants had been convicted of unlawful enclosure of public lands. The prosecutor had prevailed on the court to permit the admission of certain evidence on the promise that it would be connected up. This testimony was admitted over objection that it was highly prejudicial to the defendants in that it showed that one of them had killed a person in a quarrel in connection with the unlawful fencing. The court in its instructions told the jury not to consider this evidence as a part of the case and to treat it as though it had never been admitted in evidence at the trial. In reviewing this situation where prejudicial evidence erroneously admitted had been taken from the consideration of the jury by the instructions of the court, the case of Pa. Co. vs. Roy, 102 U. S. 451-459 was cited and quoted as follows:

> "The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell, when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to de-

> termine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence."

The opinion further states that this rule has been followed in the case of Tubbs vs. United States, 105 Fed. 59, and Hopt vs. Utah, 120 U. S. 430-438.

In the case of Francis vs. United States, 152 Fed. 155-157, being an appeal from a conviction for conspiracy to use the mails to defraud, a conversation between a witness and one not a party to the record was erroneously admitted; the court, in its instructions, had said:

> "I might right here say to you, you should leave out of any consideration whatever the conversation related by Senator Bradley with the witness * * * because it now appears there were no letters mailed after that conversation, so that you will not take that into consideration at all."

The appellate court held that this instruction was equivalent to striking out the testimony. It would seem from this decision that for a court to strike out any testimony erroneously admitted, it would not be necessary to do so in explicit terms, but that if the effect of the instruction would be to strike out such testimony that would be sufficient. In the case at bar, among the many

instructions given by the court upon this point and hereinbefore quoted, appears the following:

> "Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that where a patent is issued by the United States Patent Office it does not infringe any known patent and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindelof or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded."

We submit with confidence that if this instruction were the only one given by the court to the jury in which the rights of the appellants in regard to the patent situation were protected, that it would cure any alleged error in the admission of the Sewall testimony.

The only objection made to the Sewall testimony was on the ground that the question of the validity of the claims or patents of the Cashier Company should not be

tried out in this case. There is no objection made as to the relevancy or materiality of the testimony so far as it might go to any other question in the case. The instructions given by the court were as requested by the appellants. It follows that the defendants cannot now complain if the court did not instruct the jury more clearly or in a more specific manner upon this point than they requested. As authority upon this point we cite the following cases:

Eastern Oregon Land Co. vs. Cole, 92 Fed. 949-952.

This was a case decided by the ninth circuit and was affirmed by the Supreme Court in a *per curiam* decision.

New York, etc., R. R. vs. Madison, 123 U. S. 524-525.

Hopt vs. Utah, 120 U. S. 430-438.

Francis vs. United States, supra.

Krause vs. United States, supra.

Horn vs. United States, 182 Fed. 721-740.

All of the requested instructions of the appellants relative to the question of infringement were given by the court to the jury; in some instances the phraseology of the requested instructions was changed. It is our contention that if the court had refused to give the substance of all of these requested instructions to the jury that its

refusal would not have been error, but that, on the contrary, the testimony of Mr. Sewall was competent, relevant and material. However, the court did give the instructions, and we submit that they were more favorable than the appellants had any right to expect.

We are so confident that this court will hold that the appellants cannot now take advantage of the questions raised by these three assignments of error, that we approach a discussion of the competency of the testimony of Mr. Sewall with the feeling that any prolonged argument on this point would be superfluous, yet the record presents such firm ground for the admission of this testimony that we ask the indulgence of the court in calling its attention to certain matters in the record.

In beginning this discussion we desire to direct the attention of the court to the fact that the appellants in presenting these assignments of error have included in the statements contained therein a great deal of testimony received without objection, all under the general statement that the court erred in admitting it. We assume that this was inadvertently done by counsel for the appellants and only for the purpose of complying with the rule which requires that a statement of the testimony must be included in the assignment for the purpose of showing the manner in which the question arose. We mention this so as to call the attention of the court to the fact that in order to get a correct understanding of the

merit of these assignments it will be necessary to read that portion of the transcript containing the evidence of E. D. Sewall, between pages 184 and 231 of the transcript of record.

## THE TESTIMONY GIVEN BY THE WITNESS SEWALL WAS COMPETENT AND ADMISSIBLE:

As shown upon pages..47..to..49..of this brief, the defendants Menefee and LeMonn had inserted advertisements in three newspapers published in Portland, Oregon, in which advertisements there were contained ten wilful and deliberate false representations; as shown on pages 163 to 168, inclusive, (Transcript of Record), the defendants LeMonn and Menefee had for the purpose of inducing prospective purchasers to purchase the stock of the United States Cashier Company represented to said prospective purchasers in writing, that the United States Cashier Company had never had any notice of any alleged infringement of the patents of said company, whereas in truth and in fact these representations and each, every and all thereof were deliberately false and untrue, and known to be false and untrue by the said two defendants at the time said representations were made.

In addition to this it appears from an examination of defendants' exhibit I-3-d (letter from Menefee to Robb of date February 26, 1912); defendants' exhibit

I-3-e (letter from Robb to Menefee of date March 4, 1912; defendants' exhibit I-3-f (letter written by Robb to Welky, under date of March 4, 1912, copy of which was enclosed to Menefee); that the defendant Menefee had written to Robb requesting that a letter be written to Emil Welky to the effect that the United States Cashier Company had complete protection upon its patents; that Robb wrote to Welky as requested, gave him a glowing account of the patent situation of the company, but refrained from saying anything about the question of infringement, and that he sent a copy of this letter to Menefee explaining that the reason he could not consistently advise Welky that there was no danger of infringement was that such statement would not be true. These exhibits introduced by the defendants during the time that the government was putting in its case in chief are all made a part of the bill of exceptions by a separate stipulation and order of date March 23, 1916. It further appears from the evidence given by Mr. Sewall that he was clearly qualified to testify as an expert in patent matters. That at the time the applications for patent of the United States Cashier Company were filed the company had notice and knowledge given to it by the patent department that certain prior issued patents would be infringed by said applications.

It appears that, notwithstanding all of these notifi-

cations relative to the danger of infringement which must have brought home to Menefee and LeMonn the knowledge that the computing machine could not be manufactured and sold by the United States Cashier Company, these two defendants continued to exploit the computing machine and to send a model thereof all over the country for the purpose of influencing the sale of stock.

It is shown by reference to the following letters and telegrams that Menefee and LeMonn and all of the sales agents were exploiting the computing machine long subsequent to this notice of infringement and that the model of the computing machine was being used by the salesmen for the purpose of influencing the sale of stock at times long subsequent to the date when Menefee and LeMonn had explicit notice to the effect that the United States Cashier Company could never market for sale its claimed invention:

Letter written by LeMonn to Mrs. Armstrong, of date November 4, 1911. (Government's Exhibit No. 311);

Letter written by LeMonn to Griffith and Graham of date December 7, 1911 (Government's Exhibit No. 312);

Letter written by Menefee to Hunter and Hopson of date January 2, 1912 (Government's Exhibit No. 313);

Letter written by Hunter and Hopson to Menefee of date January 11, 1912 (Government's Exhibit No. 314);

Letter written by Menefee to E. E. Amsden, of date January 13, 1912 (Government's Exhibit No. 315);

Telegram from Hunter and Hopson to the United States Cashier Company of date January 19, 1912, (Government's Exhibit No. 316);

Letter written by Menefee to E. E. Amsden of date January 22, 1912, (Government's Exhibit No. 317);

Letter written by LeMonn to Malthouse of date February 3, 1912, (Government's Exhibit No. 318);

Letter written by LeMonn to Hall of date February 7, 1912, (Government's Exhibit No. 319);

Letter written by LeMonn to Hall of date February 7, 1912, (Government's Exhibit No. 320);

Letter written by LeMonn to F. E. Hall of date February 21, 1912, (Government's Exhibit No. 321);

Telegram sent by LeMonn to H. E. Malthous of date March 1, 1912, (Government's Exhibit No. 322);

Telegram from the defendant Bonnewell to the United States Cashier Company of date March 7, 1912, (Government's Exhibit No. 323);

Letter written by LeMonn to Mrs. A. W. Armstrong of date March 8, 1912, (Government's Exhibit No. 324);

Letter written by Menefee to Hunter and Hopson of date March 14, 1912, (Government's Exhibit No. 325);

Letter written by Menefee to all salesmen of date March 14, 1912, (Government's Exhibit No. 326);

Telegram sent by LeMonn to Hopson of date March 22, 1912, (Government's Exhibit No. 327);

Letter written by LeMonn to Moore and Muraine of date April 30, 1912, (Government's Exhibit No. 328);

Telegram sent by Hunter and Hopson to LeMonn of date May 12, 1912, (Government's Exhibit No. 329-A);

Telegram sent by Menefee to Hunter and Hopson of date May 13, 1912, (Government's Exhibit No. 329-B);

Telegram sent by Menefee to Hunter and Hopson of date May 14, 1912, (Government's Exhibit No. 329-C);

Telegram sent by Davidson to Menefee of date July 27, 1912, (Government's Exhibit No. 330-A);

Telegram sent by Menefee to Davidson of date July 27, 1912, (Government's Exhibit No. 330-B);

Letter written by Menefee to Mrs. Armstrong of date October 2, 1912, (Government's Exhibit No. 331);

Telegram sent by the United States Cashier Company to Ford Dix of date February 5, 1913, (Government's Exhibit No. 333);

Letter written by Menefee to Davidson of date February 10, 1913, (Government's Exhibit No. 334);

Telegram sent by the United States Cashier Company to Mrs. Armstrong of date February 21, 1913, (Government's Exhibit No. 336);

Letter written by Menefee to Ford Dix of date March 1, 1913, (Government's Exhibit No. 337);

Letter written by Menefee to Kellam and King, of date April 11, 1913, (Government's Exhibit No. 339);

Letter written by Menefee to E. E. Amsden of date May 13, 1913, (Government's Exhibit No. 340);

Telegram sent by Ford Dix to Menefee of date June 9, 1913, (Government's Exhibit No. 341);

Telegram sent by Menefee to Mrs. Armstrong of date August 23, 1913, (Government's Exhibit No. 342);

We call the attention of the court to the fact that on the same day (October 5, 1911) that John F. Robb had written to Mr. Overlin, the chief inventor of the United States Cashier Company, and had advised him of the danger of infringement likely to be encountered by any attempted manufacture of this computing machine, he, Robb, wrote another letter marked "Immediate attention Mr. Menefee"; this letter is also made a part of the bill of exceptions by the stipulation and order of date March 23, 1916; it is marked as Defendant's Exhibit No. I-3-c, and we quote the following extract therefrom:

"I have not received as yet further advices supplementing Mr. Overlin's night letter answered on the 26th of September. You will understand that I was interrupted in the infringement work by instructions in said night letter and would like to know whether the report covering my work completed to date is to be sent or is it to be delayed until some further developments? I think this of grave importance because in the infringement search I have run across certain patents controlled by the National Cash Register Company which will affect our computing machine. Indeed, I believe that the portion of my report directed to the above matter may be the most important development of my work because it is probable that a consultation of your mechanical department and the officers of your company may have to be called to determine upon your future operations in the computing machine line. Unless I run across some other patents bearing on this line the National Cash Register people have protection that may seriously interfere with us."

It was subsequent to the receipt by Menefee of these notifications that he sent the computing machine out for demonstration purposes and inserted in the newspapers many of the advertisements relative to the great value

of the patent rights of the computing machine.

The situation presented by the record, briefly, is this:

The defendants Menefee and LeMonn had advertised that the United States Cashier Company owned patents to five certain machines; at the time these advertisements were inserted the applications were not on file. They falsely stated that they had no knowledge or notice of any infringement; notwithstanding the fact that they did have notice of infringement they then used their machines for the purpose of assisting in the sale of stock; unable to secure broad and basic protection such as they had advertised they were willing to accept any sort of an instrument from the patent office, just so it would be designated as a patent to a particular kind of machine and thus lead the public to believe that they had broad basic protection and monopoly for all time to come, knowing that the claims in their applications for patent would, upon final allowance, be limited to certain specific mechanism and that all of the broad basic features of their invention had long since been owned and controlled by others. For these reasons this testimony of the patent expert relative to the infringement of which the defendants had knowledge was competent for the purpose of showing an intent to defraud. Again, it is alleged in the indictment:

"Whereas, in truth and in fact and as the de-

fendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the said shares of stock and each, every and all thereof, were of very little value and of practically no value whatsoever, and said shares of stock and each, every and all thereof were practically worthless"; (Transcript of Record p. 17).

It is also alleged in the indictment:

"Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment then and there well knew, none of the said "INVESTORS", or any other person who should purchase said shares of stock, would ever receive, either from said corporation, namely: United States Cashier Company, or from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F.

Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, or Oscar A. Campbell, any dividend whatsoever;" (Transcript of Record p. 18).

It is also alleged in the indictment:

"Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, each and every person who should purchase any of said shares of stock from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or from said corporation, namely: United States Cashier Company, would suffer and sustain a loss on account of said transaction of all sums of money which any of said persons should pay over or deliver to said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell,

> or to said corporation, namely: United States Cashier Company, in exchange or payment for said shares of stock." (Transcript of Record p. 21).

If the applications for patents which the United States Cashier Company had on file with the patent office infringed certain prior issued patents of other companies to such an extent that the United States Cashier Company could not manufacture or sell its machine, then the stock of the United States Cashier Company was worthless and of no value; this being one of the allegations in the indictment it was proper for the government to prove that the patent applications of the United States Cashier Company were worthless.

The court in permitting the Sewall testimony to be received in evidence limited the effect of this testimony so that it was received only for the purpose of showing an intent to defraud.

The indictment charges:

> "That for the purpose of inducing * * * the said investors * * * to purchase said shares of stock * * * and to pay over and to deliver to the said defendants * * * and to the said corporation, money and property in exchange and payment therefor, the said defendants * * * would falsely and fraudulently

and by means of printed advertisements to be by the said defendants inserted in newspapers * * * to be written in letters * * * and by words to be orally spoken by the said defendants * * * represent, pretend and promise, that the said corporation owned the patents to,

1—A certain Change Computing Machine,
2—A certain Bank Cashier Machine,
3—A certain Lightning Change Maker,
4—A certain Currency Paying Machine,
5—A certain New Style Adding Machine."
(Transcript of Record, p. 12, 13).

The indictment further charges (Transcript of Record, p. 16) that in truth and in fact and as the defendants at and during all of the times stated in the indictment well knew, neither the company nor any of said defendants owned the patents to either the,

1—Said certain Change Computing Machine,
2—Said certain Lightning Change Maker,
3—Said certain Currency Paying Machine,
4—Said certain New Style Adding Machine.

It will be observed that in this negative allegation the author of the indictment neglected to include a reference to the Bank Cashier Machine on account of which fact counsel for the defendants at the trial strenuously in-

sisted that it must be conceded that the United States Cashier Company did own a patent to the Bank Cashier Machine. That this position is not tenable, we have shown by authority heretofore quoted and especially by a reference to the case of Ewing vs. United States, 136 Fed. 53-56.

The question first arose at the time the Ovaitt testimony was offered and the following proceedings thereupon occurred:

> "Thereupon counsel for the defendants said, 'I am content with this limitation, that these two matters will be instructed to the jury, that the patent is not in controversy.'
>
> "And the court said, 'In this case I understand it is admitted in the indictment.' " (Transcript of Record, p. 176).

It was the contention of counsel for the government at the trial, and it is our contention now, that notwithstanding the fact that the indictment failed to negative the ownership of the Bank Cashier Machine, the indictment did, as shown on page 13 of the transcript of record, specifically charge that the representation as to the ownership of the patents to these five machines was a false pretense, and as shown on page 11 of the transcript of record, the indictment charges that the representations to be made to the public by the defendants were dishonest, fraudulent and false.

It is therefore our contention that these allegations in the indictment would of themselves be sufficient to admit the proof that the United States Cashier Company was not the owner of any patent to the Bank Cashier Machine; but for the purpose of the argument, conceding that such proof was inadmissible for the purpose, and treating the matter as though the Bank Cashier Machine had not been mentioned in the indictment at all, still, after having proven that the defendants had represented that the United States Cashier Company was the owner of the Bank Cashier machine it was then quite proper for the court to permit the government to prove the falsity of this representation and to limit the effect of that testimony so that it would be received for no other purpose than to show an intent to defraud.

Learned counsel for appellants, at page 67 of their brief, gravely propound the question,

> "Now, it was not pretended or claimed that Ovaitt's claim was in fact good, but only that it menaced 'a great and grave danger.' Were the defendants obliged to quit selling the company's stock because they discovered that one of their patents was claimed by somebody else under a transaction that originated before they bought it, upon peril of being convicted of bad faith, and of having their action construed as a scheme and artifice to defraud?"

Counsel does not answer this question and we do—Our answer is, "Yes, if they were honest. Emphatically yes, in view of the knowledge of Bilyeu, the eastern trip of LeMonn, his fraudulent telegram and letter and the fraudulent action of the board of directors thereon; the knowledge of Menefee of the Payograph in June, 1910; the conversation between Menefee and Ovaitt; the conversation between Menefee, Ovaitt and Bilyeu; the failure to sell the English rights on account of the English patent to the Payograph and the letter of Robb to Menefee of date October 17, 1913."

As a striking example of the extremely technical theory advanced by counsel for the appellants we quote from pages 67 and 68 of his brief:

> "The indictment, therefore, does not only not inform defendants of the charge involved in the Ovaitt evidence, but it misleads them, for by charging the representation as to the bank cashier patent and failing to show that it was false, it invites them to be unwary of an attack in that quarter."

Our answer to this is—Inasmuch as the Cashier Company never did own the patent how could these appellants, who were the company, possibly have been misled. And if misled would they not have had time during an eight weeks trial to have proven they had a patent if they had had one.

The argument of counsel for appellants (Appellant's brief, pp. 84-87, inclusive) and his deductions from the authorities cited therein are not applicable to this case at all, and are all based upon a false premise. Counsel states that after the citation of prior issued patents had been made the claims of the Cashier Company were allowed. He then proceeds to reason that the matter of the citations thus became merged into the final action of the department in granting the patent. The answer to this is that the statement of fact submitted is not borne out by the record.

As shown at page 19 of the transcript of record, the indictment alleges that the United States Cashier Company, at and during all of the times stated in the indictment was insolvent and that the defendants knew it was insolvent. For the purpose of proving this insolvency it was therefore competent to prove that the applications of the United States Cashier Company for its patents were worthless. As shown on page 16 of the transcript of record the indictment further charges that the United States Cashier Company was not engaged in either the business of manufacturing or selling any of said machines, but on the contrary its business was to sell and dispose of its capital stock. Under this allegation the proof of infringement was competent because it tended to show that the company was not contemplating the manufacture or sale of any of its machines.

We therefore confidently submit the following propositions to the court concerning these assignments of error No. IV to XVI, inclusive:

1—The testimony was competent, relevant and admissible;

2—Assuming for the purpose of the argument that the testimony was not competent, still no prejudicial error was committed because the court subsequently withdrew from the consideration of the jury all of the said testimony.

N. Y. etc., R. R. Co. vs. Madison, 123 U. S. 524-526.

Eastern Oregon Land Co. vs. Cole, 92 Fed. 949-952.

Hopt vs. Utah, 120 U. S. 430-438.

Krause vs. United States, 147 Fed. 442-451-452.

Francis vs. United States, 152 Fed. 155-157.

Horn vs. United States, 182 Fed. 721-740.

## ASSIGNMENTS OF ERROR XVII, XVIII, XIX.

These assignments are all based upon the action of the court in giving three instructions to the jury. These three instructions are as follows:

Assignment of error numbered XVII is directed against the following instruction:

"It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the businss of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations, or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money."

Assignment of error numbered XVIII is directed against the following instruction:

"In considering this question, the question of and concerning the intent to defraud, you must

direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent."

Assignment of error numbered XIX is directed against the following instruction:

"The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if the defendants, by means of the false and

fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception."

We respectfully invite the court to carefully read and consider the entire charge, feeling confident that the court will be impressed with its thoroughness, its clearness and its fairness. In fact, the charge taken as a whole was more favorable to these appellants than they had any right to expect from a court that had been for weeks listening to the proof of fraud as the same is set out in detail in the transcript of record.

It is urged by the appellants that by these three instructions complained of the trial court took from the consideration of the jury its right to pass upon the question of the good faith of the appellants and that the court instructed the jury to find that the appellants were acting with a fraudulent intent. The reading of the instructions will admit of no such conclusion, but in addition to this it is apparent from the many other instructions given by the court that the jury was repeatedly instructed that an intent to defraud was a necessary

element in the case. The court instructed the jury as follows:

> "You will observe that there are three essential elements necessary to constitute a crime under this statute. First, there must be the act of two or more persons conspiring and confederating together. One person cannot conspire with himself, and therefore there must be at least two persons acting together in order to constitute a conspiracy. Second, it must appear that the purpose of the conspiracy was to commit an offense against the United States, that is, to violate some law of the United States. And, third, one or more of the conspirators, after the conspiracy has been formed, must do some act to effect the object thereof. Each of these elements is an essential ingredient of the crime charged, and must be established by the government, to your satisfaction beyond a reasonable doubt, before you can find a verdict in its favor." (Transcript of Record, p. 237.)

and as follows:

> "While a conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons, on

different occasions, did acts of a similar nature looking toward the same end or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention. The evidence must show that the parties accused, and each of them, agreed and confederated together to do the acts charged." (Transcript of Record, p. 238.)

and again, as follows:

"The law in force at the time it is alleged the conspiracy charged in the indictment was formed and existed provides that whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, shall, for the purpose of executing such scheme or artifice or attempting to do so, place or cause to be placed any letter, postal card, package, writing, circular, pamphlet, or advertisement in any postoffice, to be sent or delivered by the postoffice establishment of the United States, shall be guilty of a crime and punished accordingly.

"It is this statute the defendants are charged with having conspired to violate." (Transcript of Record, p. 240, 241.)

and again, as follows:

"A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent purpose, even if material, are not fraudulent." (Transcript of Record, p. 248.)

and again, as follows:

"As I understand the testimony, it is admitted that, at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case." (Transcript of Record, p. 248, 249.)

"It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned patents to the certain coin machine here-

tofore mentioned, when in truth and in fact they did not own such patents. If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any wilful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent and a patentee in accepting such patent is not thereby guilty of bad faith. You are not

called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? (Transcript of Record, pp. 247-248.)

And the court also instructed the jury as follows:

"Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief, as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the charge that the company was not intending to engage in either the business of manufacturing or

selling such machines." (Transcript of Record, p. 249, 250.)

The court also instructed the jury as follows:

"To defraud implies or includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something which he already has." (Transcript of Record, p. 241.)

and also, as follows:

"It is necessary, therefore, that it should appear to your satisfaction from the testimony, and beyond a reasonable doubt, that the conspiracy entered into by the defendants, if there was such a conspiracy, was to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses or representations to be effected by the postoffice establishment of the United States." (Transcript of Record, p. 242.)

and also, as follows:

"The defendants have each entered a plea of not guilty. This plea is a denial of every material allegation in the indictment, and imposes upon

the Government the burden of proving each and all of these to your satisfaction, beyond a reasonable doubt, before you will be justified in returning a verdict in its favor."

"Now, the material allegations in brief are, first, that there was a conspiracy, agreement, or understanding upon the part of the defendants; second, that such conspiracy was to devise the particular scheme to defraud set out in the indictment; and, third, that it was a part of the understanding and agreement that the postoffice establishment of the United States was to be used for the purpose of executing the scheme. It is therefore incumbent on the Government to prove, not only that the defendants conspired together to devise the particular scheme set out in the indictment, but that it was a part of such agreement or conspiracy that the scheme should be executed by the use of the postoffice establishment of the United States; and if as to any one or more of the defendants the Government has failed to prove any one or more of the elements necessary to constitute the crime charged, it is your duty to find such defendant or defendants not guilty." (Tr., p. 245, 246.)

and also, as follows:

"With reference to the evidence that the price

of the stock was raised at intervals, if you find that it was done in the honest belief at the time that the progress of the affairs of the company justified such raise, and that the stock was of the value of the increased price, though such belief may not have been justified by the then condition of the enterprise as indicated by subsequent events, you cannot find the defendants guilty because they proved to be mistaken about that." (Tr., p. 250.)

and also, as follows:

"The indictment also charges that it was the purpose or intent of the defendants to defraud the persons named in the indictment, and the public generally, out of their money. The law presumes that every person intends the natural and probable consequence of his own act, and if you believe from the evidence, and beyond a reasonable doubt, that the defendants, or any two of them, conspired to do the things named in the indictment, substantially in the manner and form as therein set out, and that it was the natural and probable consequence of their acts that purchasers of stock of the Cashier Company would be defrauded, then you would be justified in finding that it was the intent of such defendants so entering into the conspiracy, if there was a con-

spiracy, to defraud the persons named." (Tr., p. 252.)

and also, as follows:

"While circumstantial evidence is admissible and competent to establish a fraudulent intent, it is equally admissible and competent for the purpose of establishing good faith and honesty of purpose, or the non-existence of a fraudulent intent; and it is for you to say in this case, from all the facts and circumstances, whether the defendants entered into a conspiracy to devise a scheme and artifice for the purpose of defrauding those with whom they might deal, as charged in the indictment, or whether they acted in good faith. They are not on trial for evolving or devising an improvident or impracticable scheme, even though you should find their plan to be such. Nor are they on trial for mere errors of judgment. They are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the Government to prove to your satisfaction, beyond a reasonable doubt. And where, as in this case, circumstantial evidence is relied on, the circumstances themselves must be proven, to the satisfaction of the jury and beyond all reasonable doubt, and when so proven, they must not only be

consistent with the main fact in issue, namely, the guilt of the defendants, but they must be inconsistent with every other rational hypothesis. The question for your determination is whether the defendants were acting in good faith in the sale and disposition of the stock of the corporation with which they were connected, or whether they were using such corporation and its business as a basis for a fraudulent scheme." (Transcript of Record, p. 258, 259.)

and also, as follows:

"Now, gentlemen, this is a criminal case. The defendants have each entered a plea of not guilty, and, as I have said to you, that imposes upon the Government the duty of proving every material allegation necessary to constitute the crime, to your satisfaction beyond a reasonable doubt, before you can convict.

"When I have said heretofore in these instructions that a certain fact must be established by the Government, or a certain fact must be proven before you are justified in finding a verdict of guilty, I have meant always that it must be proven to your satisfaction beyond a reasonable doubt.

"The defendants, and each of them, are presumed to be innocent of this charge. This pre-

sumption is not a mere fiction which can be disregarded at pleasure. It is a substantial part of the criminal law of the country, and continues and abides with the defendants throughout the trial until overcome by the testimony. They are not required by law to prove their innocence. The burden is upon the Government to prove their guilt, and that beyond a reasonable doubt." (Transcript of Record, p. 264, 265.)

"You are the exclusive judges, gentlemen, of the credibility of the witnesses and the weight to be given to their testimony. You are also the exclusive judges of all questions of fact, and if at any time during the trial the court has intimated its views concerning any disputed question of fact, or the testimony of any witness, you are to disregard it unless it conforms to your own understanding." (Transcript of Record, p. 265, 266.)

The court had instructed the jury that in regard to the alleged false representation regarding the enterprise of manufacturing the machines mentioned in the indictment, that if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines in the belief as the situation then appeared to them, that it would be profitable to the company and its stockholders then the defendants could not be found

guilty of the charge that the company was not intending to engage in either the business of manufacturing or selling such machines. (Transcript of Record, p. 249.) A similar instruction relative to the evidence concerning the price of stock and the fact that it was raised at intervals was also given to the jury by the court:

> "The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and dec-

larations construed and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions." (Transcript of Record, p. 250, 251.)

Again, as shown on page 256 of the transcript of record, the court instructed the jury as follows:

> "In determining whether or not the defendants intended to defraud the investors of the money by selling to them the shares of stock of the corporation, you have a right to take into consideration the question of how commissions which the evidence shows, or tends to show, were received by the defendants, or any of them, from the proceeds of the sale of the stock." (Transcript of record, p. 256.)

and the court also instructed the jury as follows:

> "Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of

fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, great latitude is allowed in its admission, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, established or corroborated by minor circumstances, be sufficient to constitute conclusive proof. And where fraud in the purchase or sale of property is in issue, evidence of frauds of like character, committed by the same parties at or near the same time, is admissible, on the ground that, where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable

that they proceed from the same motive." (Transcript of Record, p. 256, 257.)

and the court also instructed the jury as follows:

> "The defendants, therefore, are not to be found guilty merely for selling or offering for sale stock in the corporation, although it may have proven an unprofitable investment to the purchaser, nor for mere mistakes or errors in judgment. And there is no presumption of fraud from the fact that glittering and glowing promises may have been made and not carried out, unless it shall appear that the persons who made such promises knew at the time of making same that they could and would not be carried out." (Transcript of Record, p. 259.)

## IN REVIEWING INSTRUCTIONS THE WHOLE THEREOF SHOULD BE CONSIDERED.

We submit as a proposition of law, almost elementary, that in reviewing the instructions of a trial court for the purpose of ascertaining whether or not error has been committed, all of the instructions must be read and the charge must be considered as a whole. This legal proposition is so well settled in federal courts that it hardly needs citation for support. However, the following cases are directly in point:

No. Pac. R. R. v. Babcock, 154 U. S. 190-201, in which the court said:

> "Separated from the context this general language might have misled, but when considered in proper connection with the rest of the instruction given, it could not have done so."

Agnew v. U. S., 165 U. S. 36-49-50.

This case has been reviewed in connection with another point. It is one where the defendant was convicted of making false entries with intent to defraud while an officer of a national bank. In a portion of the instructions given by the lower court, which were assigned as error, it was stated that intent may be presumed from the doing of a wrongful or fraudulent act, which, if proved, throws the burden on the defendant to prove to the jury beyond a reasonable doubt his innocent intent. The Supreme Court in passing upon this assignment, said:

> "Conceding that the statement of the court that the evidence, to overcome the presumption, must be sufficiently strong to satisfy the jury beyond a reasonable doubt was open to objection for want of accuracy we are unable to perceive that this could have tended to prejudice the defendant, when the charge is considered as a whole."

In the case of Stout vs. United States, 227 Fed. 799-802, the defendant had been convicted of misapplying funds of a national bank of which he was president. Error was assigned because of the refusal of the trial court to give certain instructions and to certain parts of the charges given. The court, in considering these assignments said:

> "One request sought an instruction that the accused was not on trial for various defaults or misconducts which were enumerated. But the charge of the court contained a definite statement of the offense set forth in the fifth count, and that he could not be convicted of something else. It was unnecessary to negative the other matters in detail. The parts of the charge given which are criticised are not objectionable, when viewed as they should be in their proper context."

When all of the instructions given by the court are read together it is clear and plain that the court left every question of fact to the jury and that the jury was carefully instructed to the effect that before the defendants or any of them could be found guilty it would be necessary for the government to show to the satisfaction of the jury and beyond a reasonable doubt that the defendants deliberately set out to defraud the investors. The portion of the instructions against

which most of the objection of counsel for the appellants is directed is that part of the assignment of error No. XVII, which reads as follows:

> "It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No." (Transcript of Record, p. 308.)

We submit that in order to properly interpret this instruction the entire instruction must be read and that this instruction must also be read in conjunction with all of the other instructions in the case. When this is done it appears that the court was commenting upon the argument of counsel to the effect that the cardinal point in the case was the intent actuating the defendant. The instruction might possibly have been more clear if the first portion thereof had been as follows:

> "It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Does this mean their intent that they could make the business of the United States Cashier Company a

> success? Does this mean their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No."

And when the entire instruction is read, it appears that this was the meaning of the court, and that the jury could not possibly have been misled by the instruction. If the court had intended to instruct the jury as a matter of law that the evidence showed a conclusive intent to defraud upon the part of the defendants then it would not have been necessary for the court to have given to the jury that portion of the said instruction which is made the basis of assignment of error No. XVII, which reads as follows:

> "If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances

agree to make in order to induce the investors and the public to pay over their money." (Transcript of Record, p. 308.)

Counsel for appellant at page 104 of their brief insist that the jury could not have understood the instruction which is made the basis of assignment of error XVII. Counsel puts upon it an entirely unwarranted construction. The correct rule is to consider the instructions as a whole.

Pointer vs. United States, 151 U. S. 396-416.

The claim made by appellants is without merit when all of the instruction is read and analyzed.

Stout vs. United States, 227 Fed. 799, 802.

No. Pac. R. R. Co. vs. Babcock, 154 U. S. 190-201.

## THERE WAS NO ERROR IN THE COURT'S INSTRUCTIONS ON "INTENT TO DEFRAUD."

It remains to be considered whether the instructions correctly state the law governing an intent to defraud growing out of wilful, false representations made for the purpose of inducing prospective purchasers to part with money.

By the instruction which is made the basis for as-

signment of error XVII, the jury was instructed that if the appellants agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporations, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief that they could finally make it a success, would furnish no condonation or legal excuse for the said false and fraudulent representations.

Taking the instructions as a whole, as they define the proof necessary to establish an intent to defraud, they were more favorable than these appellants had any right to expect. In the face of the record, the court would almost have been justified in telling the jury as a matter of law that the scheme which the evidence proved had been carried out by the appellants was a scheme to defraud.

By the instruction which is made the basis for assignment of error XVIII, the court instructed the jury that in considering the question of the intent to defraud, the jury should direct its attention to the intent presented by the particular transaction set out in the indictment. The rest of the instruction is substantially the same as the instruction which is made the basis

for assignment of error XVII, and these we will consider together.

We believe it to be the law that if the pretenses and promises alleged in the indictment were false and known to be false by the appellants at the time they were made, and are made for the purpose of deceiving and misleading the public, then it would make no difference whether the investors were actually defrauded or not, assuming that by such false representations and promises they had been induced to do that which they would otherwise not have done, and to part with their money and property at times when they would not have done so if the true conditions had been known to them. There is also the legal presumption existing in both civil and criminal cases that the intent with which an act is done is inferred from the result of the act itself and that the law presumes that every sane man intends the legitimate consequences of his own act. Applying these principles of law to this case, if the defendants made representations known by them to be false and untrue for the purpose of deceiving the public into making purchases of the stock of the company, then they would be presumed to have intended to defraud them unless that presumption could be overcome by a showing of good faith. The only way that they could show their good faith would be to prove either that the representations were true or that if they were untrue this fact was not known to them at the time the representations

were made. Upon these legal propositions there is an abundance of adjudicated authority.

The case of Harris vs. Rosenberger, 145 Fed. 449-455, is a case in which an injunction was granted by the lower court against the enforcement of certain postal fraud orders issued against Rosenberger's concern prohibiting it from selling through the agency of the mail, whiskey of a different quality and character from that advertised; in this case the government admitted that the whiskey was sold at a fair market valuation and was worth the full price charged. The lower court granted the injunction but on appeal the Circuit Court of Appeals for the eighth circuit reversed the decision of the lower court. Rosenberger contended that the postal fraud statute, rightly interpreted, did not embrace all schemes and artifices for obtaining money through the mail by means of false representations, but only those in which it was contemplated that absolutely nothing whatever equivalent in value to the money given should be given in return therefor. In commenting upon this construction of the statute the court said:

> "The third proposition proceeds upon the theory that sections 3929 and 4041 are to be read in connection with cognate criminal statutes (Sections 3894 and 5480, as respectively amended September 19, 1890, c. 908, 26 Stat. 465, and March 2, 1889, c. 383, 25 Stat. 873) (U.S. Comp.

St. 1901, pp. 2659, 3697) and in the light of the maxim 'noscitur a sociis' and that, when they are so read, the provisions therein against 'conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false and fraudulent pretenses, representations or promises,' although broad and comprehensive, are restricted to schemes which are wanting in all the elements of a legitimate business, or in which it is intended to return nothing whatever or nothing at all equivalent in value for the money or property obtained. And, applying this theory to the facts disclosed before the Postmaster-General, it is contended that, as selling whiskey is a legitimate business, and as the appellee was giving an equivalent in value for the money obtained, the case was not within the statutes, although the settled plan upon which the business was being conducted was that of obtaining orders and remittances by means of intentional and gross misrepresentations calculated to induce purchasers to believe that they were buying something different from that which was actually being sold and worth more than what they were parting with.

"While not doubting that the statutes named are to be read together, we do not accede to the

interpretation sought to be placed upon them. They have been frequently considered by the courts, and because of the comprehensive language in which they are expressed the efforts to narrow them by construction have not been successful."

The court then reviews a number of authorities in support of its conclusion, and at page 458, says further:

"Our conclusion is that when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons, by means of false representations, to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually being sold, it becomes an objectionable scheme or device within the intendment of sections 3929 and 4041, although what is being sold may approximate in commercial value the price asked and received. The difference between such a scheme or device and those where nothing whatever or nothing at all equivalent in value is intended to be returned for the money obtained is one of degree only, but not of principle. Both are grounded in deceit, operate injuriously upon the public, and constitute the obtaining of money by means of false pretenses. A purchaser is entitled to re-

ceive what he is induced by the vendor's representations to believe he is ordering and paying for, and not something which he does not order and may not want at any price."

Durland vs. United States, 161 U. S., 306, 313.

In this leading case under the postal fraud statute the court says:

"In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise, make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought

> that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the postoffice from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise."

At page 312 of the Durland case, the court, in commenting upon the scheme of defendant, says:

> "In other words, he was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such."

In the brief of the appellants, counsel contends for this case that it narrows the fraudulent schemes condemned by the statute to those where the defendants have no belief in the success of their business, or at least to those cases wherein those who have invested in the business could never possibly get any returns from it. We submit that this leading case is not fairly susceptible to any such construction.

O'Hara vs. United States, 129 Fed. 551-555.

This was a case under the mail fraud statute. The court, in speaking of the scheme charged, said:

> "The intention to make false and fraudulent representations by means of circulars and letters transmitted through the mails, and thus obtain money from the credulous, constituted the scheme itself.
>
> "The objection that on its face the scheme was impossible of execution, and therefore should have deceived no one, is without merit. * * * Schemes to defraud depend for success not on what men can do, but upon what they may be made to believe, and the credulity of mankind remains yet unmeasured."

One of the best considered cases which has been brought to our attention is the case of Wilson vs. United States, 190 Fed. 427. This case bears such a striking resemblance to the case at bar that we invite the attention of the court to a careful analysis and comparison of them. In the celebrated case against Wilson, he and his associates were indicted, tried and convicted for conducting what is commonly known and called the "wireless swindle." Practically every element of the scheme and artifice to defraud mentioned in the Wilson case is present in the case at bar, and in addition to this in the case at bar we have a great many additional allegations and proofs

of fraudulent intent. At page 433 of the opinion, the Court said:

> "But whatever may be the rule in civil cases, we are satisfied that damage is not made an essential element of the federal statutory offense of using the mails to execute a scheme or artifice to defraud. We are of the opinion that a scheme or artifice is established by proof of false and fraudulent misrepresentations by which a person's right of open and fair dealing is invaded; that having shown that the defendants used false and fraudulent means to induce persons to part with their property and to purchase stock which was not of the value represented, the government was not required to go further and prove either the existence or extent of damage to the purchasers.
>
> Any other construction of the statute would deprive it of all force in dealing with fraudulent schemes in the guise of legitimate corporate enterprises and would place a premium on lies and deceit. It would only be necessary to deal in a stock of uncertain value, e. g., of a corporation owning patent rights, and all the false and fraudulent statements imaginable could be made with impunity and the mails be used to prey upon the public. Purchasers would not obtain that which they were promised; their money would be ob-

> tained by false and fraudulent representations, but in how many cases would the government show that they failed to get their money's worth? How could the real value of such shares be established?"

At page 439 of the opinion, the Court, in considering the question as to whether or not the evidence was sufficient to sustain the conviction of two of the defendants, reviews that portion of the evidence which shows that the said defendants, being salesmen, had a contract with the company by which they were to receive a fifty per cent commission for the sale of the wireless stock. Commenting upon this phase of the case the Court said:

> "A court may almost take judicial notice of the fact that the stock of a corporation selling for twice its par value, does not require the payment of such a commission to dispose of it. If it does, the selling price must be altogether artificial. The inference must be either that the company is fraudulent if the commission is not excessive, or that the commission is fraudulent if the company is what it purports to be."

In the case at bar the commission upon the sale of the stock was fifty per cent and was divided between the conspirators as follows:

The agent making the sale received thirty per cent;

the sales manager, LeMonn, received ten per cent; and the president, Menefee, received ten per cent. The stock was not only selling at twice its par value as in the Wilson case, but at three times its par value, and the indictment alleged, and the proof shows, that it was a part of the conspiracy to sell the stock at $50.00 per share which would have been five times its par value. The conclusion to be drawn from a comparison of these two cases seems to us to be irresistible.

In affirming the Wilson case, the court concluded its able and exhaustive opinion upon the law in the following terse language:

> "For these reasons, we reach the conclusion that no error was committed in the trial of the three defendants. Moreover, after an examination of the evidence, we think that their conviction was right: While their original purpose may have been legitimate, while they may have believed in the future of wireless telegraphy, we are satisfied that they deliberately entered into a scheme to take advantage of the public interest in a great and meritorious invention to sell to the public thousands of shares of stock which they knew to be practically worthless. They could accomplish their objects only through the use of the mails, and through the use of the mails has come their condemnation under a federal statute. But

the judgment will not serve the purpose it ought to serve if it be regarded merely as inflicting punishment on these defendants. It should reach far beyond them and serve as a warning to that vast crowd of speculators, promoters, gamblers and adventurers who pose as men of business and affairs and carry on their operations in the borderland between legitimate undertakings and criminal schemes. It ought to bring home to their understanding that the misappropriation of other peoples' moneys is not distinguished from larceny by designating the process a great corporate enterprise; that inducing hundreds of men and women to part with hundreds of thousands of dollars for worthless securities calls for condemnation just as much as cheating in the sale of a single musical instrument or photograph album; that after all there is no merit in wholesale knavery over cheap tricks or in gilded devices over barefaced swindles, and, furthermore, that neither swindlers of high degree nor cheats of low station can employ with impunity the mails of the United States in aid of their fraudulent schemes." (p. 439).

In the case of McGregor vs. United States, 134 Fed. 187-195, the defendant was charged with having conspired with others to defraud the United States while he was in the employ of the postoffice. The conspirators

were charged with having fraudulently awarded a certain contract for mail pouches to one Smith, and they contended on appeal that the government was not defauded because it had suffered no loss. Considering this question the court said, at page 196:

> "We find from the record that said counsel was contending in his argument that the evidence before the jury did not show that the defendants had intended to defraud the United States, as they might have thought that the government would suffer no loss by awarding the contract to Smith, because, if he had not furnished the pouches Runkel would have furnished them at the same price; and that, if the defendants did not think they were defrauding the United States, they did not then have the corrupt motive, without which there could have been no intent to defraud; and that, while men like the judge on the bench, or counsel in the case, might know they were, under the circumstances set forth by the witnesses, defrauding the government, still men of the character, and position of the defendants might not have so thought."

The court, in disposing of this argument, said:

> "It is well settled that the law presumes that every man intends the legitimate consequence of his own acts, and that such acts, when knowingly

> done, cannot be excused on the ground of innocent intent. In both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts."

The doctrine laid down in the McGregor case was followed in the case of Agnew vs. United States, 165 U. S. 36.

The case of Walker vs. United States, 152 Fed. 111 (opinion by Judge Wolverton), was a mail fraud case. We quote from page 115 of the opinion:

> "It is further insisted that there was no intent to defraud shown, looking throughout the whole testimony given in the case, which has been brought up in the record. It is entirely clear, however, that the intent is patent when the scheme itself is understood, and that it was unnecessary that it be further shown by the admissions, or the express assertions, of the defendant himself as to what his purpose was in devising the artifice or scheme, and in working in pursuance thereof."

The language of the court just quoted in the Walker case might well be applied to the case at bar. A scheme whereby the defendants would falsely represent that

they owned a large number of valuable patents, were engaged in the business of manufacturing and selling machines, and were putting them on the market; were falsely representing that privately owned stock was treasury stock, the proceeds of which were to go into the company, whereas in truth and in fact they were to go into the pockets of the defendants; the publication of false and untrue statements of assets and liabilities, the statement that the company was in a splendid financial condition when in truth and in fact it was insolvent and known to be such; presents a scheme to defraud in which the intent is much more self evident than in the scheme considered by the Court in the Walker case.

McCarthy vs. United States, 187 Fed. 117, was a mail fraud case in which the appellants alleged error on the ground that the court should have instructed a verdict for the defendants because there was no evidence establishing that any fraudulent scheme had been devised or operated. The court, in describing the scheme, said:

> "It is not necessary to reproduce the circulars, maps, and bird'e-eye views which were exhibited to persons who responded to the first request. Without containing an absolute misstatement as to any single fact, the whole description was carefully devised to lead prospective purchasers, resident some of them in distant states, to suppose

> that the 'Park' was practically an extension of the well-known 'Westhampton Beach,' with its churches, schools, electric light, etc., and that it was a 'suburban district of Greater New York.' "

The appellate court approved the following instruction as being in accord with Durland vs. United States:

> "The question you have to consider is whether these defendants planned and intended, or tried to plan, a method by which they could use the mails in getting people to communicate with them, or come into communication with them, and they could get in touch with people, so these people would be deceived or misled into paying or sending money for some article of value to these defendants under ideas not justified by the facts as they actually existed."

At page 109 of the brief of the appellants, counsel concludes that the court has instructed the jury that they might convict for making a false promise and a false assurance, believing it to be true. Of course, in the instruction, the court had told the jury that the representation would also have to be fraudulent, which word would of itself imply an intent to defraud. The charge of the court when considered as a whole, or in fact, when any part or portion of it is considered, cannot be fairly construed so as to bear out the present contention of the appellants, and it could not have been so construed

by any person of even less than average intelligence, for the court, in its instructions, as hereinbefore shown by reference cited, said to the jury over and over again, that the false representations must have been knowingly made and knowingly false or no verdict of guilty could be returned against them.

Colburn vs. United States, 223 Fed. 590-596, is a case wherein the theory was advanced that a certain amount of "puffing" was permissible, but the court held that if this so-called "puffing" was done fraudulently that it would constitute a violation of section 215. We quote from page 596 of the opinion:

> "In view of the fact that the charge in the indictments was that the defendants made the representations concerning the land fraudulently and with the intent and purpose of deceiving persons to whom they might come, an instruction telling the jury that the law indulges sellers in 'puffing their property' to bring about sales at the highest attainable price, and otherwise as stated in the requested instruction, would have been contradictory to the general scheme of the indictments and fatally misleading, without some modification to the effect that the justifiable 'puffing' must have been within the limits of honesty and fair dealing. Without such modification the instruction would have justified the jury

> in finding the defendants not guilty, however fraudulent their representations might have been. The request was properly denied."

The supreme court denied a petition for a writ of certiorari in the Colburn case, 239 U. S. 643.

Kaplan vs. United States, 229 Fed. 389, 390.

This was a mail fraud case where the defendant was convicted of sending a false financial statement through the mails. In passing upon the question whether this would constitute a scheme to defraud under the statute, the court said:

> "The crucial question, however, is whether or not the defendant devised a scheme to defraud by using false statements of his financial condition to induce the sale to him on credit of a large quantity of goods which, had the truth been known, would not have been sold. Here, the controlling consideration is the truth or falsity of the statements. If false and known by the defendant to be false, it is impossible to reconcile his conduct with honesty. * * * The jury has found the issue of fact against the defendant and we see no reason for disturbing their verdict."

This case is clearly parallel with ours as far as the instructions are concerned, or as far as the interpretation placed upon them by the defendant is concerned.

Here the court says the test is whether or not the statements were false and the defendants knew them to be so.

Bettman vs. United States, 224 Fed., 819, is a case wherein the defendant was convicted of a mail fraud similar to the Kaplan case above cited. The Bettman case goes very fully into the law on the subject wherein an intent to defraud is presumed from false and fraudulent representations knowingly made for the purpose of deceiving the public.

In this case the defendant's contention on appeal was that the mail fraud statute did not apply to the act of one engaged generally in a legitimate business otherwise legitimately conducted, but who for the purpose of obtaining money, property or financial credit, makes a knowingly false statement of his financial condition, either in a single instance or in a series of similar instances, not joined together, but independent of each other, but is confined to broader and more comprehensive frauds, such as the case of a business *systematically* and designedly so conducted generally that through false representations persons are induced to part with their money or property in the belief that they are getting something different from, or better and worth more than, what is actually being furnished. It was further urged that a clear distinction exists between "an intent to defraud" and the formation of a "scheme or

artifice to defraud." But the appellate court held that such contention was without merit, and said at page 824:

> "'A scheme may include a plan or device for the legitimate accomplishment of an object. But to come within the terms of the statute under consideration the artifice or scheme must be designed to defraud,' and the term 'defraud' was held to mean only 'the wrongful purpose of injuring another.' A fraudulent scheme may be within the statute, even though used in the prosecution of an established business, legitimate if honestly conducted."

It was also urged in this case that

> "The indictment does not charge and that the evidence does not show that there was a scheme or artifice to defraud. The argument is that the indictment does not charge that the corporation was insolvent, and that there was no evidence that it was a part of the scheme to give notes not worth par; that the scheme, in order to be criminal, must have contemplated the giving of notes not worth the money paid therefor, so that those taking the paper would receive at the most, something unsubstantial, although it is not claimed that it is necessary to prove that the notes were actually worth less than their face."

We might say here in further explanation that the scheme charged in the indictment was that the defendant was to furnish a false financial statement to a certain broker or banker, who had in the past been buying the commercial paper of the corporation of which the defendant was president and then negotiating it, and this financial statement was made for the purpose of having the broker discount a certain amount of commercial paper. The mails were used in effecting this scheme. The appellate court, however, in disposing of this last above mentioned contention, said at page 827:

> "We are not impressed with this contention. * * * It is not necessary to criminality under the act that nothing whatever is to be given in return for the money received * * * nor is mere solvency of the borrower or the *collectibility in fact* of the notes necessarily conclusive against an intent to defraud. * * * In our opinion the purchasers of the paper in question were defrauded within the meaning of the law; That is to say, they were *injured* when the possession of their money was obtained by materially false representations of the financial worth of the borrower, and such purchasers thereby subjected to substantial risk of failure to recover back their money. * * * Their money in such case was obtained by false and fraudulent representations."

There was another point of interest decided in this case. The financial statement proven to be false was typewritten and signed by the defendant. However, there was no proof of who did the typewriting or who wrote any of the figures on the statement, the bookkeeper of the comapny being unable to identify this. There was also testimony that the defendant was not a bookkeeper and did not understand bookkeeping. However, the court held that in view of the defendant's intimate connection with the business, and the asserted impracticability that one so familiar with it and in the habit of borrowing money for the business would overlook certain large items which were left out of the statement, there was room for an inference of fact that the defendant knew of the falsity of the financial statement, and the evidence was sufficient to go to the jury on the question of such knowledge. (Page 828.)

Ewing vs. United States, 136 Fed. 53, (9th Cir.) 57.

This is the same case above cited, wherein the court decided it was not necessary to negative allegations of false representations. The question as to what constituted an intent to defraud was also presented here. We quote from page 57 of the opinion:

> "It was further urged that the indictment is fatally defective for want of averment that the plaintiff in error intended to defraud any one.

> The indictment charges that the false representations were made 'solely for the purpose of obtaining money, goods, and property of the said persons whom they might induce to enter into correspondence with them,' and further alleges that, 'by reason thereof, certain persons named were induced to, and did, give to the plaintiff in error and his associate certain money.' But it is urged that there is no allegation of an intent on the part of the plaintiff in error to convert the money so obtained to his own use. Such an allegation was unnecessary. The indictment charged a scheme to defraud by means of false representations to be disseminated through the mails, that the scheme was carried out, that the representations were false and fraudulent, and that thereby certain named persons were induced to part with their money and give it to the plaintiff in error. The indictment thus charged all the essential elements of an offense under the statute."

Horn vs. United States, 182 Fed. 721-737, is applicable and interesting, and we quote from page 737 of the opinion:

> "A representation made by means of letters or circulars sent through the mails may be so obviously without foundation in fact as to afford ample evidence of a criminal intent. Neverthe-

less, if the representation is made upon an honest conviction of its truth, or upon facts affording reasonable grounds to believe that it is true, it does not aid in effecting a scheme to defraud. Whether or not such representations are false, or, if false, were made with an honest belief that they were true, is a question of fact, even though the representations may be such as to evince to an intelligent mind their untruth. Each of the defendants testified that he believed the representations made by him to be true; but this is not conclusive, and there was an abundance of other testimony that the value of the mining property, and other facts within the actual knowledge of each defendant, were such that he could not honestly have had any well-grounded belief that the representations made by him as to the present or prospective value of the property were true. The question, therefore, was one for the jury."

At page 108 of the brief of the appellants, criticism is made of that portion of the instruction where the court uses the crime of embezzlement as an illustration. This illustration was used by the court in the instruction which forms the basis of assignment of error XIX. We submit that the illustration was an apt one and one which was entirely proper and should have been

made. In this connection, we desire to call attention to the case of Pointer vs. United States, 151 U. S. 396-416, which holds that such illustrations are permissible.

## THE INSTRUCTIONS GIVEN ON "INTENT TO DEFAUD" WERE WARRANTED BY THE EVIDENCE.

We now pass to a consideration of the question as to whether or not the evidence in this case warranted these three instructions complained of relative to an intent to defraud. Much that we have already said upon the admissibility of certain testimony has a bearing upon this question; within the limit in which this brief should be kept in order not to unduly try the patience of the court it will be impossible to review all the testimony which would authorize the court to give these three instructions of law to the jury.

We will at this time, however, refer to some additional proof of fraud which appears in the record.

In this connection, assuming that the court will read that portion of the bill of exceptions set out in the transcript of record between pages 111 and 189 which deals with the proof of fraudulent conduct upon the part of these appellants, we will refer only at this time to certain of the exhibits introduced in evidence and made a part of this bill of exceptions by stipulation of coun-

sel and the order of the court. At page 136 of the transcript of record there appears the following statement with reference to these exhibits:

> "These exhibits and each, every and all thereof were received in evidence and read to the jury, the government having offered testimony which tended to prove the issuance of each document and the authorship of each letter and telegram, together with proof that each of the letters was transmitted through the mails at the direction of the writer."

Government's Exhibit No. 190 is a letter written by the defendant Hopson to the defendant Menefee, of date June 13, 1912. This letter is as follows:

> "Hope to pull Dr. Milliken across the plate tomorrow for $5,000.00 worth of our stock at $20.53 per share. It will make the total sale $5,185.50. The reason for the odd amount is this: I am selling him a block at twenty dollars and he is to pay interest on it since it was first sold, which in this case was Feb. 12th. He must take the entire block, of $5,000.00 worth, in order to get the syndicate agreement and a place on the board of advisors. Now, he can buy 400 shares at fifteen and intended doing so until I sprung this syndicate agreement and telegram from you to the effect; that you had looked him

up and that I might offer him place on the advisory board. Of course you never saw that wire, but having received telegram blanks, it wasn't hard to get it. The Dr. is another Campbell in that he likes the honor and incidentally the long end of the deal. He is president of the Mt. Shasta Banking Company here and an A1 man for us. He is worried about whether or not he will have jurisdiction over enough of the surrounding territory. I have assured him on that score. Now he is not in shape to take the entire block himself right at the present moment as his money is out on loans and he is getting four of his friends to go in with him. I told him tho, that the stock will all be issued to him personally and that any arrangement he might have with his friends would have to be between he and them. He to do that, because I told him that in order to get the stock at the special price and under the syndicate agreement, the company insisted that he must take at least $5,000.00 worth. The Dr. is confident that with his help we can sell several thousand dollars worth of stock in this valley, but to do it he wants the company to send a completed machine here. Please let me know at once after I wire that the deal is closed just when we can get the completed machine. The Dr. has a car and believe me has been some

busy the past several days getting this thing through. Your letter to him, and the by-laws and articles of incorporation passed muster in A1 shape. Of course like all such men he found plenty of things that he thinks could be made better. One thing in particular and a point that I conceded was, that the syndicate agreement read as follows on 4th line of paragraph 3: 'States set aside five (5%) per cent of the selling and leasing price.' As it now reads the word leasing is not there. That should make no great difference to the Company, but it makes a lot of difference to him.

"Now two of his friends will be in town tomorrow and the deal will be closed at that time, so he assured me a few minutes ago. He, like Campbell, is well to do and can and will buy more later. We had to give him personally 5% of our commission, which is 10%, to repay him for interesting his friends. We get $185.50 interest tho to offset the $250.00. Now the stock, if any is sold after the Dr. takes his, is to be sold at $30.00 per share. The main trouble is going to be in keeping the people from finding out about the cheap stock advertised by the brokers. The Dr., as I said before, knows of several blocks and is buying this, only, because

it carries the prestige with it. It is impossible to get wires in here, except by telephone, and the telephone is all same Scott Valley Banking Company and they are knocking. Be careful what you wire me for that reason. Joe is still at Montague and may be able to bring the Dr. there through. I don't know much about the deal but he said yesterday he thought he could. That party is also wise to the cheap stock and just how Joe got around it I don't know. It's a hard point to cover, that I do know. I just had a talk with Joe, over the phone, and he has not closed his man as yet, but still thinks it good.

"When you get this if you do not understand exactly what the deal is write me and will explain more fully. Be careful what you write Milliken and bear me out in my statements regarding requirements necessary to become a member of the advisory board and requirements necessary to purchase stock under the syndicate agreement. Above all else get us a completed bank machine pronto. Continue to send my mail to Montague.

"Hoping to hear good news from your end of the line, I beg to remain,"

On June 22, 1912, Menefee answered this letter as is shown by Government's Exhibit No. 191, which is a

letter written by Menefee to Hunter and Hopson at Montague, California. In this letter the following statement is made:

> "I appreciate the full explanation you have given me in regard to Dr. Milliken and I think the letter I wrote must have done the work properly inasmuch as you were able to close him."

When Menefee received the letter (Government's Exhibit No. 190) from his co-defendants who were sales agents, he knew that they were attempting to defraud Dr. Milliken. The letter can admit of no other conclusion. In this letter the agent tells Mr. Menefee that he has deliberately represented to Dr. Milliken that which is not true and the entire matter is treated as a huge joke. By a fake syndicate agreement (Government's Exhibit No. 219) the stockholder is promised an earlier dividend than the rest of the stockholders will receive on account of his membership upon a so-called advisory board. The agent explains to Menefee that he has told Dr. Milliken a deliberate falsehood concerning a telegram and that he has deliberately forged a telegram for the purpose of interesting the prospective purchaser. Menefee not only wrote Hopson and thanked him for the information but over two months later Menefee wrote a letter to Mr. Bell at Las Vegas, Nevada, (Government's Exhibit No. 192) in which the following statement is made:

"We are advised by our Messrs. Hunter & Hopson that you have been considering an investment in the stock of our company and we are writing this letter, not to present an argument why you should invest, but with the idea of assuring you that Messrs. Hunter & Hunter are to be depended upon in all of their representations. They have been with the company for some time and from their record with us, as well as the record they have held for many years previous, we know them to be dependable in every way. Knowing them as we do, we have unhesitatingly authorized them to receipt for any moneys, notes or checks payable to the company with full authority to endorse notes and checks."

The entire Milliken transaction is shown by the following exhibits:

Government's Exhibit No. 190,

Government's Exhibit No. 191,

Government's Exhibit No. 191-A,

Government's Exhibit No. 193-A,

Government's Exhibit No. 193,

Government's Exhibit No. 194,

Government's Exhibit No. 219.

The conclusion is irresistible from a reading of these documents that it was the plain intent of all parties concerned to deliberately defraud Dr. Milliken out of his money.

In a letter written to the defendant Joseph Hunter at Reno, Nevada, under date of January 30, 1913 (Government's Exhibit No. 413), the following statements are made by the defendant Menefee:

> "We are trying to round out our stock selling as rapidly as possible. The fact is we have deals on at $30.00 which will amply take care of the Company's treasury stock, and we have to handle, in order to keep the market clear, a quantity of stock for private parties, and we are trying to take off the market all we possibly can. We can handle this situation very nicely if we can rush up our miscellaneous sales in some way.
>
> "I can not put this proposition up to very many and do not want to except in isolated places where it wont interfere with other sales and our stock selling generally. You are one of perhaps two or three that we have working for us, that we can put this confidential proposition up to, and we would not put it up to you except that you are going to a new location where I think there will not be much communication between the stockholders there and other places. If you

do not want to work the proposition in this way, all you have to do is to say so and go at it in the same old way that you have been doing.

"What I want to propose is that you could work like you did in northern California last summer at $20.00 per share, only at that rate we would have to realize $15.00 per share, which would only leave you a commission of 25%. This advantage in the price would rush up the business so that you would make more money at that commission than at 30% insisting on selling at $30.00 per share.

"You understand if you work in this way that your subscriptions must be taken on the blanks that read Joseph Hunter, and your argument would be that the Company stock was practically all placed and all provided for by contracts already made with a possibility of one or two failing and having to be sold to outside parties. With such a contingency no Company stock was to be had, but that you could sell a couple hundred shares or whatever amount you think proper to work on, and then sell it as long as you had sales, regardless of whether the amount runs out or not, and the stock you sell is either some of your previous sales at that price which your people have not been able to pay for, and which you can get by turning in the money

quickly, or else that you got hold of a small block from a party that was hard up and had to realize some money, and in that way you were able to let them have the inside figure, unknown to the Company of course. As a matter of fact, this is a private matter and must not be considered as Company business.

"I do not need to say more to you as you are so used to these situations, and will readily realize whether you had better work it this way or not, and if so on what plan you want to work. Whatever plan you do adopt if you go to working this way, write me fully personally, so I will know what to say if inquiries are made."

By a reference to the following exhibits:

Government's Exhibit No. 139, being telegram of date September 14, 1911;

Government's Exhibit No. 146, being telegram of date October 19, 1911;

Government's Exhibit No. 146-E, being telegram under date of October 19, 1911;

Government's Exhibit No. 176, being telegram of date March 7, 1912;

Government's Exhibit No. 188, being telegram of date May 1, 1912;

Government's Exhibit No. 187, being telegram of date April 24, 1912;

Government's Exhibit No. 182, being telegram of date April 11, 1912;

Government's Exhibit No. 174, being telegram of date February 28, 1912;

Government's Exhibit No. 166, being telegram of date January 16, 1912;

Government's Exhibit No. 129, being telegram of date July 3, 1911;

Government's Exhibit No. 129-b, being telegram of date July 3, 1911;

it is shown that it was the custom of the officers of the United States Cashier Company to send telegrams to the agents in the field, which telegrams were to be shown by the said agents to prospective purchasers for the purpose of influencing quick sales of stock.

By a telegram (Government's Exhibit No. 129), all agents residing in Seattle, Washington, Spokane, Washington, and Lewiston, Montana, were advised as follows:

> "You are hereby authorized to sell two hundred fifty shares at twelve fifty providing applications are mailed to us by July fifth bearing date not later than July first as this block was allotted

to San Francisco agency for which settlement was not received."

On the same day this telegram was sent, the home office wired the following telegram (Government's Exhibit No. 129-b) to its agents residing in Oregon and California:

"You are hereby authorized to sell two hundred fifty shares at twelve fifty providing applications are mailed to us by July fifth bearing date not later than July first as this block was allotted to Montana agency for which settlement was not received."

It will be noted that these two telegrams were sent on the same day. In the telegram first hereinabove quoted, the agents residing in Washington are advised that they may sell two hundred fifty shares of stock because the San Francisco agency has not paid for the same. In the telegram to the California agents they are advised that they can sell two hundred fifty shares at $12.50 because the Montana agency has not paid for the same.

This is one of the many examples where the falsehoods of the officers of the United States Cashier Company made for the purpose of influencing the sale of its capital stock is demonstrated.

We have singled out these undisputed proofs of

fraud for the purpose of illustrating its magnitude and scope.

There was nothing either honest or fair about the conduct of these officers of the United States Cashier Company. They deliberately set out as shown by the proof to swindle and gouge the public. The proof of their fraud is in the record uncontradicted and unexplained. Under such circumstances the court would have almost been justified in telling the jury as a matter of law that the defendants had been engaged in a scheme to defraud the public.

## THE ALLEGATION IN THE INDICTMENT THAT IT WAS A PART OF THE CONSPIRACY TO PUBLISH FALSE STATEMENTS OF THE FINANCIAL STATUS OF THE COMPANY, WAS PROVEN BY THE EVIDENCE.

We have, in this brief, found it necessary to refer to a great number of the 442 exhibits introduced in evidence at the trial by the government, all of which are now before the court by virtue of stipulation of counsel and order of the trial court as a part of the record. Concerning all of these exhibits, counsel for appellants, at page 10 of his brief, disposes of them in the following language:

> "The bill of exceptions shows, following the language of the indictment, that the government

> offered evidence tending to prove all these allegations. The detail of that evidence is not stated in the bill of exceptions except that a great many letters and documents introduced as exhibits in the case have been referred to in the bill of exceptions, and it is stipulated between the learned district attorney and the defendant's counsel that all of these exhibits may be deemed a part of the record and referred to in the same manner as if they had been printed in the record. So far as the case of the plaintiffs in error is concerned, it is not deemed necessary or helpful to consider these exhibits, or any other part of the record than the evidence recited in the bill of exceptions, in order to determine the validity of their assignments of error."

Yet it does appear, and it plainly appears, that a great many of these exhibits are necessary and helpful in the consideration of the several questions here involved.

We quote from page 110 of the brief of counsel for the appellants:

> "We are not favored with the contentions that will be made by the district attorney, except that we have reason to believe that the evidence on the part of the government contained in the exhibits will be urged as sufficient to indicate to this court

that the defendants are in fact guilty and that the case ought not to be reversed for that reason. If such a contention shall be made, since we will have no other opportunity otherwise to reply to that contention in a brief, we simply say now that the defendants are entitled to a jury trial, with correct instructions as to the law governing them, and if error was committed it must be presumed to have been prejudicial; that we are not trying the question of the guilt or innocence of the defendants in this court, but only the question whether they have had a fair and legal trial. That is the only question for the court in any case, and particularly in this case, where the evidence on behalf of the defendants is not made a part of the bill of exceptions."

Answering the above we say that we have not quoted from the record for the purpose of showing that the appellants were guilty. We have done so for two purposes: first, to show that certain evidence was admissible, and that certain instructions were properly given and were applicable to the facts in the case; and second, for the purpose of showing that the guilt of the appellants was so plainly proven and in fact demonstrated that the verdict should not be set aside on account of technical objection.

But after counsel for the appellants have, as herein-

before quoted, stated their position broadly in this, that they have not presented the question or the guilt or innocence of their clients to this court, they then proceed at page 111 of their brief to discuss a question which bears only upon this guilt or innocence. Their excuse for doing so is that unless the matter is explained an unfavorable inference may be by this court drawn against their clients, for which reason counsel hastens to correct this impression, but at the same time remaining absolutely silent concerning all of the other many charges of fraud alleged in the indictment and substantiated by the proof as shown by repeated reference herein to the record itself. Counsel for the appellants have in this instance taken up one of the minor charges leaving all the rest absolutely unexplained.

The indictment alleged (Transcript of Record, p. 19) and the proof showed (Transcript of Record, p. 117-118), that during all of the times mentioned and stated in the indictment the United States Cashier Company, as these appellants then and there well knew, was absolutely insolvent; and the indictment alleged (Transcript of Record, p. 23), and the proof showed (Transcript of Record, p. 120) that it was a part of the conspiracy that these appellants were to publish false and untrue statements of the assets and liabilities of the United States Cashier Company, in which the assets were to be therein stated, in sums greatly in excess of the true value of said assets and in which there were to

be omitted liabilities amounting to more than the sum of one-half million dollars.

There is not one line in the entire record to either deny or to explain in any way either these allegations or this proof. Yet counsel, by argument and reference to testimony, seeks to explain these discrepancies at pages 111 to 115, inclusive, of their brief.

Heretofore in this brief we have adhered strictly to the record; for every statement of fact that we have made we have cited to the court a reference to both exhibit number and page of record; not one single assertion that we have made in this entire brief but is proven by specific reference to the record itself. Yet, now we are confronted with an invitation by counsel for the appellants to make to the court a statement which does not appear in the printed abstract of record, although it did appear in the evidence.

This invitation is made at page 114 of the brief of the appellants in the following language:

> "There was evidence of discrepancies, however, in the statement of the liabilities in two, or perhaps three, instances.
>
> "The exact amount we have not at hand, but are content that the district attorney shall state the same to the court if he choses."

If we did not accept this invitation, the court might

assume that the discrepancies between the published statements of assets and liabilities and the true condition were of no consequence. For this reason we accept the invitation, and for the first time depart from the printed record. The facts shown by the evidence in regard to these discrepancies are:

a. In printed reports to stockholders, the alleged net worth of the corporation was figured without reference to the capital stock outstanding;

b. In a letter of date February 28, 1911, the defendant LeMonn stated that the assets of the company were $383,696.78, and that the only liabilities were bills payable amounting to $23,447.13. On that date the evidence showed that the United States Cashier Company owed upon its patent account $175,000, which was not listed as a liability; that this statement was knowingly false is shown by the letter of date February 6, 1912, written by LeMonn to E. G. Howe, in which the statement is made:

> "In February, 1911, the stock was advanced to $12.50 per share, at which time our assets had grown to $383,696.78 and our cash liabilities for patents were yet $175,000."

c. On August 24, 1911, the company sent a copy of Bradstreet's report to each of the agents of the company. This statement omitted a patent liability of $113,025.21.

d. In the report of the stockholders' meeting of date

June 9, 1913, a financial statement was made as of date April 30, 1913, showing assets amounting to $832,-499.26, and liabilities amounting to $44,673.30. This statement includes as an asset $25,035.52 of treasury stock unsold but does not show as a liability any amount for capital stock or stock subscribed and not issued.

e. In the financial statement of date April 30, 1913, the company lists as an asset an item of $49,755.14, being for notes taken on stock subscriptions in cases where the stock had not yet been issued and yet the statement does not include as a liability the sum of $17,418.09 due agents as commission and $20,227.28 due Frank Menefee.

In the statement published in the Pacific Banker it was stated that the company had $250,000 on hand in its factory fund, whereas the proof showed that at that time they had less than $500 on hand.

To elaborate upon this feature of the case seems unnecessary. Many of the facts hereinabove stated relative to these assets and liabilities are not in the printed record, although in nearly every instance the facts appear from the exhibits on file in this court.

In conclusion, we recognize that this brief has assumed too great proportions. Under ordinary circumstances we would apologize to the court for the length of the brief, but the situation is a peculiar one. In order to save the appellants the enormous expense neces-

sary and incident to the printing of all of the exhibits we stipulated with them that these exhibits might be forwarded in the original and deemed to be a part of the bill of exceptions. Had we not done this it might have been burdensome for the appellants to have presented their case to this court. For the reason that these exhibits are not set out and copied in full in the printed transcript, it has been necessary in this brief, in a great many instances, for us to not only refer to them, but copy extracts from them; thus, by reducing the size of the transcript of record, we have been compelled to enlarge upon the size of this brief.

The appellants had a fair and impartial trial. The verdict came not because of error or prejudice, but because intelligent jurors could conscientiously reach no other conclusion from the testimony before them. The situation which now confronts these appellants has not been brought about on account of error of the court or prejudice of the jury, but it is the natural consequence of their own voluntary unlawful acts.

With the hope that this brief may be of assistance to the court, it is respectfully submitted.

CLARENCE L. REAMES,
United States Attorney,

JOHN J. BECKMAN,
Assistant United States Attorney,
Attorneys for the Defendant in Error.

# SUPPLEMENT

Since the within brief was printed, the case of United States vs. New South Farm and Home Company, et al., was, on April 24, 1916, decided in the Supreme Court. So many of the propositions of law discussed in this brief are settled by the decision that we have reopened our brief for the purpose of making a reference thereto.

We preface the citation with the statement that much that we have said in the within brief in support of our contention that an intent to defraud is presumed when wilful false representations are made of material matters in order to induce the payment of money could well have been eliminated if we had had before us this recent decision.

The defendants were indicted in the District Court for the Southern District of Florida, charged with having devised a scheme to defraud and with having conspired to devise and execute the said scheme. In substance, the indictment alleged that the defendants, by false representations, obtained from the public a large amount of money with the intent to defraud. A demurrer to the indictment was sustained by the District Court because, as stated by that court,

"For aught that appears in the indictment

> the lands to be obtained were worth fully as much as was to be paid by the parties purchasing; that the parties engaged in the sale were legitimately engaged in the sale of the lands. * * * Raising the expectations of the purchaser, but giving that purchaser value received for his money but not fulfilling those expectations, is not an offense against the statute. * * * The scheme must be one to defraud the party, or by false promises, pretenses, etc., deprive him of money or property without adequate value. Mere puffing or exaggeration of qualities, usefulness, opportunities or value of an article of commerce where the purchaser gets the article intended to be purchased and the value of the article is measured by the price paid, do not constitute the false representations, promises, etc., denounced by the statute."

The Supreme Court, in holding the indictment to be good, and reversing the action of the District Court in sustaining the demurrer, said:

> 'We concur in the view of the Government. The court, we think, construed the statute and misapprehended its import. Mere puffing, indeed, might not be within its meaning (of this, however, no opinion need be expressed), that is, the mere exaggeration of the qualities which the

article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false they become the scheme or artifice which the statute denounces. * * * We can entertain no doubt that those employing such representations, if they are false, have engaged in a scheme to defraud."

We respectfully submit that the decision above quoted is a complete answer to practically every contention made by the learned counsel for plaintiffs in error.

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